

IN THE SUPREME COURT OF MISSOURI

SC 086712

STATE OF MISSOURI *ex rel.* AMOCO OIL COMPANY,
now known as BP PRODUCTS NORTH AMERICA INC.,

Relator,

vs.

THE HONORABLE JOHN J. RILEY,
Circuit Judge, 22nd Judicial Circuit, Missouri,

Respondent.

ON PRELIMINARY WRIT OF PROHIBITION
FROM THE SUPREME COURT OF MISSOURI
TO THE HONORABLE JOHN J. RILEY, CIRCUIT JUDGE
TWENTY-SECOND JUDICIAL CIRCUIT, MISSOURI
REGARDING CAUSE NO. 002-8365

RELATOR'S BRIEF

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STATEMENT OF JURISDICTION

Upon application of Amoco Oil Company, now known as BP Products North America Inc. ("BP"), this Court issued a Preliminary Writ of Prohibition on May 31, 2005. This Court, therefore, has jurisdiction of this matter under Article V, Section 4, of the Missouri Constitution. This Court has jurisdiction to grant a permanent writ because this case involves questions about the evisceration of the attorney-client privilege, misapplied law and discretion in discovery decisions by the trial court. It also concerns the production of electronic discovery, which is an issue of first impression that is of great importance to the bench and bar and is being decided erroneously by the lower courts. Each of these issues constitutes an independent ground for this Court to grant a writ of prohibition. See State ex rel. Faith Hospital v. Enright, 706 S.W.2d 852, 855 (Mo. 1986) (holding that issues regarding privileges are appropriate for writs of prohibition because "once the proverbial bell has been rung, its sound can neither be recalled nor subsequently silenced"); State ex rel. Ford Motor Co. v. Messina, S.W.3d 602, 606 (Mo. 2002) (stating that a writ of prohibition is appropriate in cases involving discovery abuses by the trial court); State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 577 (Mo. 1994) (stating that a writ of prohibition will lie where there is an issue that is being decided erroneously by the lower courts that might otherwise escape review for some time and where the aggrieved party will suffer considerable hardship and expense as a consequence of that action).

INTRODUCTION

Parties involved in litigation rely on the belief that they will only have to produce documents that are relevant to the action and that are not privileged or otherwise confidential. This reliance is grounded in the Missouri Rules of Civil Procedure, which only require that relevant, non-privileged information be produced. Today, courts are increasingly called upon to apply these same rules and protections – which once only applied to “paper” documents – to the discovery of electronic documents. Specifically, courts are being asked to interpret how these rules and protections apply to discovery requests for the production of e-mails and other electronic documents. The trial court in this action, however, issued Orders regarding the production of electronic documents that completely disregard the current rules of discovery by requiring production of irrelevant e-mails that have not been reviewed for privilege, confidentiality or privacy.

The trial court issued two Orders addressing electronic discovery that are the subject matter of this action. The trial court’s February 25, 2005 Order (which upholds the trial court’s October 12, 2004 Order) (collectively referred to as the “Orders”) states that BP must produce approximately 200,000 irrelevant e-mails, which have not been reviewed by BP’s attorneys, within fifteen days of the Order. BP could not possibly conduct a full review of 200,000 e-mails within such a short time period, and was thus faced with a situation in which it would be forced to produce many e-mails which had not been reviewed at all. The trial court attempted to justify its February 25, 2005 Order, by stating that BP would not waive its right to assert the attorney-client privilege at trial if privileged documents were produced to Plaintiffs as a consequence of the Order.

(Exhibit 39 at A1221, n.1) (“these documents must be produced, but by producing the materials, BP will not waive any objections based at trial on attorney/client privilege as to any privileged document that may be included in such production”).¹

The trial court’s Orders were improper for several reasons. First, the trial court’s Orders completely disregard Supreme Court Rule 56.01(b), which allows discovery only of relevant documents, by forcing BP to produce documents that are not relevant to the underlying matter. Plaintiffs maintain that BP must manually review every single one of each employees’ e-mails in order to find e-mails that are relevant to the underlying case. In the context of electronic discovery, however, because of the massive amount of documents potentially responsive to requests for electronic data, it is often impossible or financially prohibitive to review every electronic “document” by hand. The only reasonable method of determining which documents are relevant in an electronic review is to run computerized searches using terms that are designed to separate relevant documents from irrelevant documents. See Zubulake v. UBS Warburg LLC, No. 02 Civ. 1243, 2004 U.S. Dist. LEXIS 13574 at *34-35 (S.D.N.Y. July 20, 2004) (“Zubulake V”); The Sedona Conference, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Discovery Production, Principle 11, comment a,

¹ All Brief Exhibits referenced herein are in the Appendix of Exhibits to Relator’s Brief.

(Exhibit 42 at A1352)²; Steven C. Bennett, E-Discovery by Keyword Search, 15 No. 3 Prac. Litigator 7, 11-14 (American Law Institute May 2004) (Exhibit 61 at A1812-1815).

This is precisely what BP did. BP downloaded every single e-mail written and received by 61 employees who BP determined might have information that relates to Plaintiffs' claims or BP's defenses. Instead of individually reviewing each and every one of the 500,000 e-mails (which equals millions of pages) after the group of e-mails had been re-duplicated, BP applied 428 search terms to the collection of e-mails to determine which e-mails contained relevant information. BP gleaned the search terms directly from Plaintiffs' discovery requests, and then added terms that did not appear in any of Plaintiffs' pleadings, but which BP knew would generate responsive e-mails. The e-mails that "hit" a search term were produced to Plaintiffs and are not at issue in this case; rather, the 200,000 e-mails that the trial court ordered BP to produce are the e-mails that

² The Sedona Conference "is a nonprofit, 501(c)(3) research and educational institute dedicated to the advanced study of law and policy in the areas of antitrust law, complex litigation, and intellectual property rights." See <http://www.thesedonaconference.org>. The working group's "best practices" guide has been cited by many courts that have addressed the difficult issues surrounding electronic discovery. See, e.g., Zubulake III, 216 F.R.D. at 290 n.81; see also Zakre v. Norddeutsche Landesbank Girozentrale, No. 03Civ0257 (RWS), 2004 U.S. Dist. Lexis 6026 at *3 (S.D.N.Y. April 9, 2004) (basing holding partly on Sedona Principles).

did not “hit” on any one of BP’s search terms.³ The Orders, which impliedly reject the search term methodology, have deprived BP of the right to determine which of its documents are relevant and responsive to Plaintiffs’ requests, despite BP’s reasonable efforts to produce all relevant documents. Instead, the Court essentially granted Plaintiffs unlimited access to the electronic mailboxes of 61 BP employees, regardless of relevance.

Second, the lower court issued an order that is outside the purview of the discovery rules, and which completely destroyed the attorney-client privilege by ordering production of e-mails that have not been reviewed for privilege. The trial court gave BP only 15 days in which to review 200,000 e-mails, justifying its decision by stating in a footnote that BP would not waive its attorney-client privilege at trial. (Exhibit 39 at A1221, n.1.)

The purpose of both the discovery rules and common law privilege law, however, is to allow attorneys and clients to meet and review the documents and to protect from production any documents that reflect conversations between attorneys and clients. The rules assume that the parties will actually review their documents before production. Both the Rules and opinions of this Court make it clear that privileged documents are not to be produced at all. Rule 56.01(b) only allows discovery of information that is “not privileged.” In addition, this Court, after weighing the importance of the protection of

³ Approximately 5,800 e-mails that contained a search term were removed because the subject line indicated that the e-mail contained spam or concerned a subject matter or geographic area that was irrelevant to Plaintiffs’ claims.

privileged communications against the interest in having a full production of all relevant documents, specifically decided that attorney-client communications must be given the utmost protection allowed under Missouri law. See State ex rel. Great American Ins. Co. v. Smith, 574 S.W.2d 379, 382-385 (Mo. 1978).

In contrast to this case law, however, the trial court's February 25, 2005 Order incorrectly suggests that the protection of privileged documents is only an issue concerning the admissibility of evidence at trial. The trial court failed to protect BP from being compelled to disclose privileged documents to Plaintiffs during discovery. The Order is thus wholly inconsistent with the well-settled rule of law that privileged documents are protected from disclosure in the first instance.

Third, the trial court's Orders completely disregard the undue burden and expense that BP would have to incur in order to produce the 200,000 e-mails. The discovery rules not only protect parties from production of private and confidential information, but they also disallow discovery if production would create an unfair burden or expense on the producing party. BP provided evidence to the trial court of the extraordinary cost of converting the e-mails at issue into a format sufficient for BP to perform a privilege and relevance review. The court, however, ordered BP to transfer all of the e-mails to CDs for production, reasoning that it was not expensive for BP to simply put the e-mails on a CD and produce it to the Plaintiffs.

The trial court ignored the fact that BP could not perform any meaningful review for relevance, privilege or confidentiality if it simply copied the e-mails to a CD. Rather, BP would have to spend \$62,000 to put the e-mails into its third-party vendor's review

program in order to perform a full review and to separate privileged documents from non-privileged documents. In addition, attorneys' fees would likely be in the hundreds of thousands of dollars to conduct a privilege and confidentiality review of millions of pages of documents that did not hit on a single search term. Plaintiffs have not shown any need for these documents, and the cost to BP to produce them is not proportional to any benefit Plaintiffs might receive by production of the e-mails. Moreover, the court refused to compel Plaintiffs to pay the expenses associated with this unnecessary and burdensome production.

Fourth, the trial court's Orders undermine the discovery rules by effectively precluding the parties from reviewing documents for confidentiality, privacy, trade secrets and other types of information that are typically subject to protection. Rule 56.01(c) allows a court to determine that discovery should either not be allowed at all, or that it only be allowed under certain conditions, to protect parties from "annoyance, embarrassment, oppression, or undue burden or expense." The rule is meant to balance the needs of production against the burden such production imposes on the producing party, including any concerns a party has about producing private or confidential information. In allowing a party to protect its documents for privacy, confidentiality concerns or inclusion of trade secrets, the rule assumes that the parties will review the documents before production. There are many documents contained in the 200,000 e-mails that should be protected from disclosure due to privacy and confidentiality concerns. For example, BP employees use the e-mail system to discuss confidential matters with BP management concerning their health, employment benefits, retirement

benefits and job performance. If the trial court's Orders are upheld, BP will be compelled to produce these types of e-mails, which should not be subject to discovery at all to due to privacy concerns. Moreover, these types of confidential and private e-mails are not "relevant to the subject matter involved in the pending action." Rule 56.01(b). As a result, they are not subject to discovery.

The ramifications of the trial court's Orders, if permitted to stand, are staggering. For example, parties (and their employees) would have to produce every e-mail they ever wrote, regardless of whether that e-mail has any connection to the issues of the lawsuit. It would lead to individual Plaintiffs and Defendants being forced to produce their computers in litigation without any prior review for relevance, privilege or confidentiality. It would also result in the unlimited production of confidential e-mails between employers and their employees regarding retirement benefits, health benefits, maternity leave, job performance and other private matters. Companies may be required to turn over trade secrets and other confidential information. All of this information would be produced to opposing counsel with no showing of relevancy and no balancing of one party's interest in protecting the information versus the other party's interest in receiving the information.

This Court should hold that Missouri's current rules of discovery apply to electronic discovery, and that no party can be ordered to turn over irrelevant documents that have not been reviewed for privilege, privacy or confidentiality. BP thus requests that this Court make the preliminary writ absolute, prohibiting the trial court from enforcing its October 12, 2004 and February 25, 2005 Orders. This Court should hold

that BP's search term methodology was reasonable and complied with Rule 56.01 and that Plaintiffs requested 200,000 additional e-mails that are irrelevant and should not be produced or that such production is unduly burdensome.

Alternatively, if this Court determines that the 200,000 e-mails are potentially responsive, BP requests that this Court allow BP a reasonable amount of time to review any of the "hits" for privilege, privacy, confidential matters and relevancy with the cost of the review, including BP's attorneys' review time, to be shifted to Plaintiffs.

STATEMENT OF FACTS

1. Procedural History

Plaintiffs are 27 current and former Amoco- or BP-branded gasoline station operators and 15 of their closely-held corporations, most of whom are located in the St. Louis metropolitan area. They filed their original Petition against BP in St. Louis City Circuit Court on November 13, 2000, for alleged gasoline price discrimination under the Missouri Motor Fuel Marketing Act and related common law claims. Plaintiffs' claims are based on allegations that BP implemented a pricing strategy of charging dealers more for gasoline than BP charged other types of station operators, such as jobbers (who operate their own fleets and deliver fuel to many different stations) and company-owned and company-operated stations, so that BP could eventually eliminate the dealer channel of trade. (Exhibit 54 at A1595-1599, ¶¶ 40-52.)

2. History of Discovery Dispute Regarding Judge Neill's October 7, 2002 Order

In December 2001, Plaintiffs served BP with 109 requests for production (with 45 subparts) and 91 interrogatories (with 125 subparts), many of which were overbroad and burdensome. (Exhibit 2 at A12; Exhibit 3 at A57.) The parties agreed that BP would only answer certain of the discovery requests. (Exhibit 7 at A172; Exhibit 4 at A92, n.2; Exhibit 5 at A126 n.2.) BP answered these “revised” discovery requests on May 10, 2002, objecting to many because they were overbroad and burdensome. BP made nearly 50 boxes available for inspection and provided CDs with thousands of pages of electronically-formatted documents that provided the core information for Plaintiffs’ claims, including the retail and wholesale gasoline prices charged by BP to its outlets in the St. Louis area, the competitive market areas, financial information for the St. Louis region and BP’s long-term market strategy. (Exhibit 4 at A92; Exhibit 5 at A126.) In addition, in May 2002, BP downloaded electronic documents from 61 BP employees that BP considered to be the “key players” in this lawsuit. These key players included, among others, BP employees who worked in the Chesterfield, Missouri, office who had direct responsibility for the St. Louis region. (Exhibit 19 at A524, ¶ 2; A540.)

Without ever examining BP’s production, Plaintiffs filed a motion to compel on May 23, 2002, claiming that BP’s production was insufficient. (Exhibit 6 at A151; Exhibit 7 at A173.) On September 30, 2002, Circuit Judge Margaret M. Neill issued an Order in which she declined to rule on Plaintiffs’ Motion to Compel, stating that Plaintiffs had failed to file a certificate of attempt to resolve. (Exhibit 8 at A183.) In that

Order, Judge Neill stated: “The Court notes that plaintiffs seek to compel defendants to respond to fifty-two discovery requests, some of which appear to be overbroad and burdensome. The Court believes that the parties may be able to resolve some of these disputes among themselves.” (Exhibit 8 at A192, n.1.)

On October 2, 2002, Plaintiffs’ counsel visited the trial judge’s chambers without BP’s counsel, purportedly to inform Judge Neill that a certificate of attempt to resolve had, in fact, been filed. (Exhibit 15 at A306-307.) On October 7, 2002, with no further contact or argument from Plaintiffs or BP other than Plaintiffs’ counsel’s contact of October 2, 2002, Judge Neill entered an Amended Order granting Plaintiffs’ motion to compel in its entirety, despite her earlier statement in the September 30, 2002 Order that conceded that some requests were overbroad and burdensome. (Exhibit 9 at A194.)

In an attempt to avoid litigating the issue of whether the Order was invalid as an improper ex parte order, the parties agreed upon the scope of the discovery that BP would answer, and BP began producing documents in December 2002. (Exhibit 17 at A435, ¶ 5; Exhibit 17 at A437.)

From February 2003 to September 2003, at Plaintiffs’ request, the parties stayed the case and conducted no further discovery while the parties engaged in mediation and settlement discussions. (Exhibit 10 at A205; Exhibit 11 at A207.) The settlement discussions were unsuccessful, and BP contacted Plaintiffs’ counsel in September 2003 to restart the discovery process. (Exhibit 17 at A447-451.) Discovery began again in late 2003.

On February 19, 2004, despite the parties' previous agreement regarding the scope of discovery, Plaintiffs filed a motion to compel, arguing that BP had not complied with the October 7, 2002 Order. (Exhibit 13 at A249; Exhibit 14 at A254; Exhibit 15 at A283.) The trial court heard the motion, took the matter under submission and gave BP an opportunity to respond to Plaintiffs' Memorandum of Law Regarding Alleged Ex Parte Contact. (Exhibit 16 at A324.) BP filed its opposition on March 11, 2004, arguing that the Order was invalid because it was based on an improper ex parte communication. (Exhibit 17 at A325.) On July 20, 2004, Circuit Judge John J. Riley upheld the October 7, 2002 Order that BP believed was based on an improper ex parte communication, and ordered BP to respond to all discovery that was the subject of that Order within 30 days.⁴ (Exhibit 18 at A512.)

3. BP's Electronic Discovery Production

To comply with the July 20, 2004 Order, BP began the process of reviewing hundreds of thousands of e-mails that BP had previously gathered in 2002 from 61 BP employees that BP considered to be the "key players" in this lawsuit. (Exhibit 19 at A524, ¶ 2; A540.)

BP hired a third party, Electronic Evidence Discovery, Inc. ("EED"), to help process the e-mail for review and production. In the spring or summer of 2004, EED removed duplicate e-mails, leaving approximately 501,000 items, which is equivalent to 20 gigabytes of information, or potentially as much as 10,000,000 pages of information.

⁴ Judge Riley began hearing all pre-trial motions in this case in the spring of 2003.

(Exhibit 19 at A524, ¶ 2; A540); see also Manual for Complex Litigation (Fourth) § 11.446 (2004) (Exhibit 19 at A524-525, ¶¶ 3, 4) (“one gigabyte is the equivalent of 500,000 type-written pages”). This represents the total number of e-mails, attachments and calendar items that were initially gathered from the 61 employees. At this point, none of the documents had been reviewed for relevancy. They had simply been collected and duplicate e-mails removed.⁵

Faced with the task of reviewing millions of pages of e-mails and attachments for relevancy and privilege, BP, as the responding party and as it had previously done in two

⁵ BP gathered these e-mails in 2002, but did not begin reviewing them until Judge Riley issued the July 20, 2004 Order because BP had challenged the validity of Judge Neill’s October 7, 2002 Order on Plaintiffs’ Motion to Compel. BP still maintains that Judge Neill’s October 7, 2002 Order was an invalid ex parte Order ab initio, which has the effect of making all Orders that Judge Riley has made emanating from that Order void as well (including the discovery orders at issue in this action). BP did not review the e-mails prior to the July 20, 2004 Order because BP could not have adequately reviewed the millions of pages of electronic documents without a valid Order governing the scope of discovery in place, especially given the broad nature of Plaintiffs’ discovery requests. Moreover, as noted, shortly after Judge Neill’s October 7, 2002 Order, discovery was stayed upon agreement of the parties during mediation and settlement discussions. Discovery did not recommence until late 2003 at BP’s request. BP then challenged Judge Neill’s Order in response to Plaintiffs’ Motion to Compel, filed February 19, 2004.

other similar pricing cases with Plaintiffs' lead counsel, compiled a list of search terms that could be applied to the e-mails to determine which ones might be responsive to Plaintiffs' discovery requests. This search term list contained 428 terms, which were gleaned directly from Plaintiffs' discovery requests and from BP's own knowledge of what words would yield responsive documents. BP intentionally crafted broad search terms (such as "strategy" and "market") to demonstrate that it had made a reasonable and good-faith effort to capture all potentially responsive electronic communications. (Exhibit 19 at A525, ¶ 4; A530-539.) EED applied the search terms to the 501,000 e-mails and attachments that had been gathered from the 61 employees. Approximately 307,000 e-mails "hit" on a search term and thus were deemed potentially relevant so that BP would need to review them for privilege and responsiveness.⁶ The remaining e-mails and attachments did not contain any search terms. They were therefore deemed irrelevant

⁶ BP's original estimate of potentially relevant e-mails (those that "hit" on a search term) was approximately 311,000. In fact, the actual number was approximately 307,000. The number of potentially relevant e-mails was further reduced when BP removed approximately 5,800 e-mails because the subject line indicated it was either spam or concerned an irrelevant geographical area or subject. This left the final number of potentially relevant e-mails at approximately 301,000. (Exhibit 28 at A760, ¶ 8.)

and non-responsive to Plaintiffs' discovery requests. As a result, BP did not review or produce those approximately 195,000 e-mails and attachments.⁷

The use of search terms to search electronic communications for relevant documents in discovery was a practice that BP had previously undertaken with these same Plaintiffs' counsel in similar lawsuits in other states. (Exhibit 19 at A525, ¶ 4.) In those cases, however, the search term list had only 169 search terms. BP's search term list in this case contained 428 terms – more than twice as many as were employed in the several previous cases with Plaintiffs' counsel. Although they may not have been aware of the procedure BP used to determine relevancy, Plaintiffs' counsel in those cases never complained that BP's production was insufficient. (Exhibit 19 at A525, ¶ 4; A530-539); compare to Atlanta search terms (Exhibit 28 at A782-785). BP provided affidavits to the trial court explaining its search methodology and informing the court that this method was consistent with case law on electronic discovery and the parties' previous practice. (Exhibit 19 at A525; A530-539; Exhibit 28 at A760; Exhibit 28 at A716-725.)

BP also informed the lower court that a review of the 307,000 e-mails that had been deemed responsive after the search terms were applied required BP to further

⁷ The 200,000 number that BP refers to is reached by adding the approximately 5,800 e-mails that BP later removed due to their subject line in a procedure discussed below. As clarification, approximately 200,000 e-mails are the subject matter of this action because they were never reviewed: 195,000 because they never hit a search term, and 5,800 because the subject lines clearly indicated that they would not be relevant.

process the e-mails and load them into EED's software program. This program allows BP to view and electronically separate e-mails that are relevant and/or privileged from those that are not. (Exhibit 19 at A529.) This process is expensive and time consuming. It takes EED several days to load the e-mails into the program before attorneys can begin reviewing them. (Exhibit 19 at A529.)

In August 2004, in an attempt to reduce the number of e-mails to be reviewed and the costs of a review, BP provided the list of search terms and the list of employees whose e-mails had been searched to Plaintiffs. BP requested that Plaintiffs determine whether there were any terms or employees that Plaintiffs believed could be removed from the search, or if there were any other changes that should be made to the search. In addition, on August 10 and 11, 2004, BP provided Plaintiffs' counsel with lists showing the employees whose e-mails were searched, the search terms used, the number of e-mails each search term "hit," the number of e-mails sent between employees, and the subject lines of the e-mails. BP requested that Plaintiffs' counsel advise BP if Plaintiffs believed any of the search terms could be eliminated or if Plaintiffs' counsel had any questions regarding the e-mail search performed by BP. (Exhibit 28 at A711; A790-807.)

BP also reviewed the subject lines and removed approximately 5,800 additional e-mails from the pool of 307,000 potentially relevant e-mails because the subject line indicated that the e-mail was not relevant. (Exhibit 28 at A760, ¶ 9.) These e-mails were junk mail (or spam) with subject lines such as "Get Grisham's next blockbuster novel today" or "My Miracleburn keeps the weight off" or they concerned subject matter or a geographic region that was irrelevant to the Plaintiffs' claims, for example, "MN Tax

Tree” or “Chili Contest set for Feb. 20.” (Exhibit 28 at A786-789) (highlighted items were those removed based on subject line). These e-mails were not processed. This left the total number of e-mails and attachments that were deemed potentially responsive at approximately 301,000. (Exhibit 28 at A760, ¶ 9; Exhibit 28 at A711; A790-807; Exhibit 30 at A1123-1125; Exhibit 32 at A1164-1165.)

To review the 301,000 e-mails and attachments, BP hired seven temporary attorneys who began to review the e-mails and attachments for responsiveness and privilege. (Exhibit 19 at A526, ¶¶ 5, 6.) Even with this large number of attorneys reviewing the e-mails for eight hours a day, BP made a conservative estimate that it would take it approximately seven to nine months to review fully all of the e-mails for responsiveness and privilege. (Exhibit 19 at A 542, ¶¶ 6-9.)

On August 13, 2004, BP filed a motion for an extension of time to comply with the July 20, 2004 Order. BP estimated that it would take seven to nine months to convert the 301,000 e-mails and attachments into a format that would allow BP to review them for privilege and responsiveness and to conduct such a review. In addition, BP requested, under Missouri Supreme Court Rules 56.01(c) and 77.02, that Plaintiffs be required to pay for all or part of the e-mail production, due to the large expense BP was forced to incur to produce the e-mails. (Exhibit 19 at A513.)

On August 17, 2004, the trial court denied BP’s motion for an extension of time and ruled that the motion for cost-sharing should be re-submitted at a later date. (Exhibit 20 at A561.) Because the trial court had denied BP’s motion for an extension of time to review the 301,000 e-mails for privilege and responsiveness and because BP could not

possibly review the entire set of e-mails without more time, BP reluctantly entered into a stipulated agreement with Plaintiffs on August 24, 2004. (Exhibit 21 at A562.) This stipulation stated that BP would produce the 301,000 e-mails but that the production of an e-mail that contained information protected by the attorney-client privilege or work product doctrine would not waive BP's right to assert those privileges at any time before or during trial. (Id.)

BP was nonetheless concerned about producing privileged documents. As a result, BP decided to perform a limited and cursory search of the e-mails using "privileged" search terms, which included all of BP's in-house counsel's names, BP's outside counsel's names and other fairly generic litigation terms. BP began to review these potentially privileged items; however, BP could not review all of the e-mails that hit on a "privileged" search term for privilege in a timely manner because the trial court denied BP's motion for an extension of time. (Exhibit 28 at A712-713.) Thus, on August 31, 2004, BP produced the approximately 116,000 items that had not hit on a "privileged" search term in BP's cursory privilege review and notified Plaintiffs that it would provide a privilege log containing the remaining items. (Exhibit 28 at A810-811.)

Before BP could provide its privilege log, on September 7, 2004, Plaintiffs filed a Motion for Sanctions regarding the items that BP had withheld based on privilege. It was in this motion that Plaintiffs first requested that the trial court order BP to produce all 501,000 e-mails even though the Stipulation and all argument at the hearings up to this point had only concerned the 301,000 e-mails that hit on a search term as potentially responsive. (Exhibit 23 at A565-568; Exhibit 29 at A1045-1048.) At the September 10,

2004, hearing on this motion, BP stated that it would investigate the number withheld due to privilege claims and that it would produce a privilege log showing all privileged documents. The trial court continued Plaintiffs' motion for sanctions until October 5, 2004. (Exhibit 24 at A634.)

In the course of BP's investigation of the e-mails it had originally withheld, BP determined that some non-privileged e-mails had been withheld because they contained a search term that made them appear to be privileged. BP immediately ran another search of the e-mails it had withheld, eliminating many of the broad terms it had originally employed to distinguish privileged from non-privileged e-mails. This second search was conducted using only those attorneys' names who were involved with this particular litigation, as well as several general terms that were specific to this lawsuit (such as "St. Louis and litigation"). After completing this second search, BP conducted a privilege review of the e-mails that had hit on one or more of the narrowed list of privilege search terms. The e-mails that did not hit on the more limited terms were produced to Plaintiffs, sight unseen, before the October 5, 2004 hearing. BP also produced the e-mails that hit on the more limited "privilege" terms, but were nonetheless determined not to be privileged, along with an amended privilege log for the e-mails that were withheld. (Exhibit 28 at A761-62, ¶¶ 13-17; A812.)

After this September 29, 2004 production, BP had produced a total of 300,219 items and withheld a total of 882 items based on a claim of privilege. (Exhibit 28 at A761-762, ¶¶ 13-17, 20; A812.) Privileged documents were produced to the Plaintiffs in this production because BP could only actually review a very limited set of e-mails –

those that contained outside counsel's names and specific references to St. Louis – in order to meet the trial court's deadline of producing the e-mails before the October 5, 2004 hearing. (Exhibit 28 at A761, ¶ 14.) For example, BP's subsequent review of its production revealed that numerous privileged e-mails created by BP's in-house counsel had been produced to Plaintiffs.

At the October 5, 2004 hearing, Plaintiffs claimed that BP had not produced all of the 301,000 e-mails, despite BP's production of the privilege log accounting for all of the e-mails. After the hearing, BP therefore attempted to provide an accounting to the court for all of the 301,000 e-mails before it ruled on Plaintiffs' Motion for Sanctions. (Exhibit 26 at A703; Exhibit 28 at A777.)

4. The October 12, 2004 and February 25, 2005 Orders

BP intended to file the Declaration of Wes Hagen of EED explaining BP's methodology for e-mail production and demonstrating to the trial court that BP had produced all of the e-mails that contained a search term or had at least produced a privilege log for any e-mail not produced. Before BP could do so, however, the trial court entered its October 12, 2004 Order. That Order required BP to produce all 501,000 e-mails that BP had downloaded from its employees to preserve them prior to review.⁸ (Exhibit 27 at A704.) This was the first time that the 200,000 e-mails at issue in this Court had ever been the subject of a court order.

⁸ BP eventually filed the Declaration of Wes Hagen in its Motion to Reconsider. (Exhibit 28 at A759.)

This Order required BP to produce approximately 200,000 e-mails that BP had never reviewed for privilege or responsiveness because they had never “hit” on a search term, or which were part of the 5,800 e-mails that were removed because their subject lines indicated that the e-mails were spam or concerned a different geographic region or subject matter and thus were deemed irrelevant. BP investigated the cost to put these 200,000 e-mails into EED’s review program so BP could perform a privilege review before producing them. EED informed BP that it would cost approximately \$62,000 for review and production. (Exhibit 28 at A763, ¶ 24.) This does not include attorney review time, which would cost hundreds of thousands of dollars. (Id.)

BP then filed a Motion for Reconsideration on November 2, 2004, asking the trial court to reconsider its Order. (Exhibit 28 at A707.) BP argued that the court had incorrectly stated that BP identified all 501,000 e-mails as “potentially responsive.” (Id.) BP explained that the 501,000 e-mails were the universe of e-mails preserved from employees’ computers. Of those, the 200,000 e-mails had never been identified as potentially responsive. Indeed, to the contrary, they had been deemed irrelevant because they had not hit on a search term or they were one of the 5,800 e-mails removed because their subject line indicated they were spam or concerned a different geographic region or subject matter that was not relevant to the claims in this lawsuit.

Additionally, BP argued that the production was unduly burdensome. As part of this argument, BP pointed out that Plaintiffs did not need the e-mails because BP had already produced the documents necessary for Plaintiffs to pursue their claims. (Exhibit 28 at A726-732; A861-870.) By that point, BP had produced millions of pages of

documents in St. Louis, at BP's U.S. headquarters in Chicago and at BP's Wood River Terminal. These productions included retail and wholesale pricing information, dealer files, profit and loss statements and numerous CDs containing more than 300,000 e-mails. (Id.)⁹ BP argued that this production was more than sufficient for Plaintiffs to pursue their claims, and that it was unduly burdensome for BP to review and produce e-mails that it had deemed irrelevant based on Plaintiffs' inability to show any need for the documents. (Id.)

BP argued that if the trial court still determined that they should be produced, production of the e-mails was overly burdensome, and Plaintiffs should at least be required to pay for their production pursuant to Missouri Supreme Court Rules 56.01(c) and 77.02, or, alternatively, under the cost-shifting test set forth in Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) ("Zubulake I"). (Exhibit 28 at A707; Exhibit 30 at A1113; Exhibit 32 at A1164-1171.)

On February 25, 2005, the trial court denied BP's motions. It ordered BP to produce the additional 200,000 e-mails within 15 days by "simply copy[ing] all of the e-mails in their original format onto CD ROM discs." (Exhibit 39 at A1220.) These e-mails could be the equivalent of approximately 4,000,000 pages of documents, based on the estimation above that 501,000 e-mails could equal as many 10,000,000 documents.

⁹ Since BP's November 2, 2004, Motion to Reconsider, BP has produced more than a million more pages of documents, including nearly a quarter of a million older e-mails that were inadvertently omitted from the original production. (Exhibit 29 at A1094.)

The court stated that it would not be unduly expensive for BP simply to copy the e-mails on CDs. The trial court further stated that:

these documents must be produced, but by producing the materials, BP will not waive any objections based at trial on attorney/client privilege as to any privileged document that may be included in such production, nor any objections as to relevancy.

(Exhibit 39 at A1221, n.1.)

On May 31, 2005, this Court granted BP's Petition for Writ of Prohibition or, in the alternative, Petition for Writ of Mandamus on a preliminary basis. (Exhibit 58 at A1624.) Plaintiffs, on behalf of Respondent, filed their Answer to BP's Petition on June 30, 2005. (Exhibit 59 at A1625.)

POINTS RELIED ON

- I. Relator is entitled to an Order prohibiting Respondent from enforcing the October 12, 2004, and February 25, 2005, Orders requiring BP to produce approximately 200,000 e-mails that did not contain a search term because the e-mails are not relevant to the subject matter of the pending action, and are thus not subject to discovery because BP's search term methodology constitutes a reasonable effort to ensure that all relevant e-mails were produced under Rule 56.01.**

State ex rel. Ford v. Nixon, 160 S.W.3d 379 (Mo. 2005)

Wiginton v. CB Richard Ellis, No. 02C6832, 2003 WL 22439865 (N.D. Ill. Oct. 27, 2003)

Zubulake v. UBS Warburg, 220 F.R.D. 212 (S.D.N.Y. 2003) (“Zubulake IV”)

Zubulake v. UBS Warburg LLC, 02 Civ. 1243, 2004 U.S. Dist. LEXIS 13574

(S.D.N.Y. July 20, 2004) (“Zubulake V”)

Mo. Sup. Ct. R. 56.01

The Sedona Principles: Best Practices Recommendations & Principles for Addressing

Electronic Discovery Production, The Sedona Conference (January 2004)

II. Relator is entitled to an Order prohibiting Respondent from enforcing the October 12, 2004, and February 25, 2005, Orders requiring BP to produce approximately 200,000 e-mails because the Orders eviscerate the attorney-client privilege in that they require BP to produce e-mails without allowing BP to review those e-mails for privilege and only protect that privilege at trial, not throughout the discovery process.

In Re Dow Corning Corp., 261 F.3d 280 (2d Cir. 2001)

Murphy Oil USA, Inc. v. Fluor Daniel, No. 99-3564, 2002 U.S. Dist. LEXIS 3196

(E.D. La. Feb. 19, 1996)

State ex rel. Ford Motor Co. v. Westbrooke, 151 S.W.3d 364 (Mo. 2004)

State ex rel. Great American Ins. Company v. Smith, 574 S.W.2d 379 (Mo. 1978)

Mo. S. Ct. R. 56.01(b)(1)

Report of the Civil Rules Advisory Committee regarding the Proposed Amendments to

the Federal Rules of Civil Procedure, Rule 16(b)

The Sedona Principles: Best Practices Recommendations & Principles for Addressing

Electronic Discovery Production, The Sedona Conference (January 2004)

III. Relator is entitled to an Order prohibiting Respondent from enforcing the October 12, 2004, and February 25, 2005, Orders requiring BP to produce approximately 200,000 e-mails because the trial court abused its discretion in that the Orders require production of e-mails that are overly burdensome and expensive for BP to produce in relation to the e-mails' probative value to Plaintiffs.

In re Gen. Instr. Corp. Sec. Litig., No. 96C1129, 1999 U.S. Dist. LEXIS 18182

(N.D. Ill. Nov. 18, 1999)

McPeck v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001)

State ex rel. Anheuser v. Nolan, 692 S.W.2d 325 (Mo. Ct. App. 1985)

State ex rel. Ford Motor Co. v. Messina, 71 S.W.3d 602 (Mo. 2002)

Mo. S. Ct. R. 56.01(c)(1) and (2)

The Sedona Principles: Best Practices Recommendations & Principles for Addressing

Electronic Discovery Production, The Sedona Conference (January 2004)

IV. Alternatively, Relator is entitled to an Order prohibiting Respondent from enforcing the October 12, 2004, and February 25, 2005, Orders in their entirety because the trial court erred as a matter of law by ordering the production of 200,000 e-mails with no limitation on production of dearly irrelevant, private, personal and confidential e-mails under Rules 56.01(b) and 56.01(c).

State ex rel. Clemens v. Witthaus, 360 Mo. 274 (Mo. 1950)

State ex rel. Madlock v. O'Malley, 8 S.W.3d 890 (Mo. 1999)

State ex rel. Missouri Ethic Commission v. Nichols, 978 S.W.2d 770

(Mo. Ct. App. 1998)

V. Alternatively, Relator is entitled to an Order Prohibiting Respondent from enforcing the October 12, 2004, and February 25, 2005, Orders in their entirety because the trial court abused its discretion as a matter of law by ordering production of 200,000 e-mails without allowing BP sufficient time to review its e-mails for relevancy, privilege, privacy and confidentiality concerns and without ordering that Plaintiffs pay for BP's review of the e-mails, including attorney review time.

In re Gen. Instr. Corp. Sec. Litig., No. 96C1129, 1999 U.S. Dist. LEXIS 18182 (N.D. Ill. Nov. 18, 1999)

Multitechnology Service LP v. Verizon, No. Civ.A. 4:02-CV-702-Y, 2004 WL 1553480 (N.D. Tex. July 12, 2004)

State ex rel. Ford Motor Co. v. Messina, 71 S.W.3d 602 (Mo. 2002)

State ex rel. Vanderpool Feed & Supply Co., Inc. v. Sloan, 628 S.W.2d 414 (Mo. Ct. App. 1982)

Mo. S. Ct. R. 56.01(c) (1) and (2)

The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Discovery Production, The Sedona Conference (January 2004)

ARGUMENT

BACKGROUND ON THE NATURE OF ELECTRONIC DISCOVERY.

A. The Proliferation of Computer-Generated Documents.

In today's computer-dominated world, more and more individuals and companies are using computers to keep track of their personal information, to conduct business and to conduct their personal affairs. One court has noted that it is "impossible to walk ten feet into the office of a private business or government agency without seeing a network computer, which is on a server, which in turn, is being backed up on tape (or some other media) on a daily, weekly or monthly basis. What alternative is there? Quill pens?" McPeck v. Ashcroft, 202 F.R.D. 31, 33 (D.D.C. 2001).

As a result of this reliance on computer technology, there are more electronic documents than paper documents created every day. For example, "according to one study, 93% of all information generated during 1999 was generated in digital form, on computers. Only 7% of information originated in other media, such as paper." Thompson v. United States Department of Housing and Urban Development, 219 F.R.D. 93, 96 (D. Md. 2003) (citation omitted); see also James A. Snyder and Angela Morelock, Electronic Data Discovery: Litigation Gold Mine or Nightmare?, 58 J. Mo. B. 18, 18 (2002) ("Even for a relatively small organization, the volume of messages sent electronically can be staggering. For example, a 1,000-person organization with each person sending eight messages per day results in two million electronic messages annually, not taking into account redundancies and send-on messages.") (citations omitted). Not only are more documents created electronically, most electronic

documents remain in electronic form and are never converted to paper. Steven C. Bennett, E-Discovery by Keyword Search, 15 No. 3 Prac. Litigator 7, 7 (American Law Institute, May 2004) (“the vast majority of business records are available in – often only in – electronic form”) (Exhibit 61 at A1809).

In addition to supplanting paper documents, computers have also begun to take over the realm of oral communications. Rather than walk down the hall to talk to a co-worker or pick up the telephone to call a business or personal acquaintance, people often prefer to communicate via e-mail. Byers v. Illinois State Police, 53 Fed. R. Serv. 3d 740; 2002 WL 1264004; 2002 U.S. Dist. LEXIS 9861 (N.D. Ill. May 31, 2002) (“Many informal messages that were previously relayed by telephone or at the water cooler are now sent via e-mail.”). Even when a person opts to use the telephone for communication, if a message is left for a person who is not available to answer the phone, that telephone communication could exist either on a tape or in digital form on the answering machine or voice-mail server. See, e.g., Linda M. Watson, Business Law and Litigation: Anticipating Electronic Discovery in Commercial Cases: A Guide for Corporate and In-house Counsel, 83 Mich. Bar J. 31, 31 (May 2004) (noting that the Martha Stewart trial focused on a “smoking gun” voicemail that was recorded in a back-up file).

The result of this “contemporary appetite for electronic mail, instant messaging and the use of electronic means to generate and store all manner of data” is that there is “an avalanche of recorded information” available that has been created by businesses and individuals. Adam I. Cohen & David J. Lender, Electronic Discovery: Law and Practice, § 1 at 1-3 (Aspen Law & Business, Supp. 2005).

B. Discovery of Electronic Documents.

These computer files and electronic communications, while not equivalent to a paper document, are nonetheless subject to discovery in a lawsuit as long as they are relevant and not privileged. See, e.g., Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94 Civ. 2120 (LMM) (AJP), 1995 WL 649934, at *2; No. 94 Civ. 2120 (LMM) (AJP), 1995 U.S. Dist. LEXIS 16355, at *4 (S.D.N.Y. Nov. 3, 1995) (“today it is black letter law that computerized data is discoverable if relevant”). Thus, “electronic discovery,” or “e-discovery” as it is commonly called, refers to the discovery of electronic documents data, including e-mail, web pages, word processing files, computer databases, voice mail, deleted e-mails and files, back-up files, and archival tapes. See The Sedona Conference, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Discovery Production, The Sedona Conference (January 2004), Introduction, (citing some of these forms of information and stating that “virtually anything that is stored on a computer” is discoverable) (Exhibit 42 at A1362); see also Thompson, 219 F.R.D. at 96 (citing some of these forms of information and stating that all “electronically stored information” is discoverable and must therefore be reviewed for relevance and privilege) (citations omitted).

Although electronic information may be discoverable, there are some practical differences between the production of electronic information and paper documents that can raise questions regarding the appropriate methodology and scope of electronic discovery. One of the major differences between a traditional paper production and an electronic production, a difference which is at the heart of the current litigation, is the

“sheer volume of electronic information” when compared to the average amount of paper documentation. Byers, 2002 U.S. Dist. LEXIS 9861, at *32.

One reason there are more electronic documents than paper documents is that once created, electronic information is much more difficult to destroy. A paper document is effectively destroyed when it is placed in a waste paper basket. Electronic documents, however, can remain on a computer for years, even if they have been “deleted.” Indeed, an electronic document is not actually deleted when a user hits “delete.” The order to “delete” a document simply signals to the computer that the space that document occupied is now free to be written over – the deleted document still exists until the computer actually writes over it. See Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 313 n.19 (S.D.N.Y. 2003) (“Zubulake I”).

In addition, people tend to keep documents on their computers simply because there is space and the cost of storing them is inconsequential, even if they would have long ago disposed of the documents had they been paper documents, or even though the company’s document retention policy requires destruction of the documents. Rowe Entertainment, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002). Thus, in a paper review, most of the documents are retained because they are relevant or are otherwise useful, whereas in an electronic review, many irrelevant documents are kept, simply because there is little cost associated with retaining them. Id.

The sheer volume of electronic information can lead to exorbitant costs when the parties attempt to review their documents before production. In order to produce only relevant, non-privileged documents pursuant to a discovery request, the parties and their

attorneys must sift through a much larger amount of information than is traditionally found in a paper document production. As noted by Judge Scheindlin in Zubulake I, “[t]he more information there is to discover, the more expensive it is to discover all the relevant information, until, in the end, ‘discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.’” 217 F.R.D. at 311 (citing Rowe, 205 F.R.D. at 423). Just as “the universe of discoverable material [expands] exponentially” when electronic discovery is involved, so the attorneys’ fees for reviewing for both privilege and relevance increase exponentially as well. Id.

Costs of an electronic review can also increase before a review even begins, because there are often costs associated with simply gathering the information and putting it into a program that makes it possible to review the information. See Bennett, 15 No. 3 Prac. Litigator at 9, 13-14. (Exhibit 61 at A1810; A1814-1815.) Gathering and producing electronic information can be costly and burdensome because, unfortunately, there is not a “single button one can push to make all relevant data come out of the company’s computer system.” Bennett, 15 No. 3 Prac. Litigator at 13-14. (Exhibit 61 at A1814-1815.) Rather, the reality “is that computer systems are often very messy.” (Id.)

For instance, there may be old systems that need to be accessed, incompatible software that must be made readable, and it may be necessary to hire an expert who knows how to manage such large amounts of data and run keyword searches within the data set. Id.; see also Adam I. Cohen & David J. Lender, Electronic Discovery: Law and Practice § 2.09 (Aspen Law & Business, Supp. 2005) (stating that third-party vendors are often “necessary in retrieving, searching, or analyzing electronic information”); Zubulake

v. UBS Warburg LLC, 216 F.R.D. 280, 288 (S.D.N.Y. 2003) (“Zubulake III”) (noting that the producing party had to hire a third-party vendor to restore backup tapes and that, although there may have been cheaper options, once the vendor was selected, there was nothing the producing party could do to control the costs of the vendor’s services). A review may be difficult, necessitating a third-party vendor, because “unlike most paper-based discovery, [electronic information] typically lack[s] a coherent filing system.” Byers, 2002 U.S. Dist. LEXIS 9861, at *32.

C. Protecting Privileged Documents in Electronic Discovery.

There are also non-monetary costs associated with an electronic review. The production of documents that are protected by the attorney-client privilege is one area that is of chief concern when producing electronic documents. See Report of the Civil Rules Advisory Committee regarding the Proposed Federal Rules, comment to Rule 26(f). (Ex. 60 at A1731-1735.) A privilege review may be difficult, expensive and time-consuming because of “the informality that attends use of e-mail” in addition to the fact that privileged data may be contained in embedded data or metadata that is not apparent to the viewer. Id.

To avoid the costs of a privilege review altogether, numerous courts, and the Proposed Federal Rules of Civil Procedure that are currently being considered for adoption, suggest that parties should consider whether it is appropriate for the parties to enter into an agreement that would require the return of any accidentally-produced information. (Exhibit 60 at A1734.) Some scholars, however, have questioned whether an attorney can ethically knowingly produce privileged documents, even with such an

agreement in place. See The Sedona Principles, Principle 10, comment d. (Exhibit 42 at A1398.) In addition, there is the concern (recognized in the Proposed Federal Rules) that, although the jurisdiction in which the action is pending may uphold the parties' decision to agree that the privilege will not be waived upon production, there is no way to guarantee that a court in another jurisdiction will uphold that agreement and hold that the privilege was not waived. See Report of the Civil Rules Advisory Committee regarding the Proposed Federal Rules, explanation of changes made to Rule 26(f) after publication. (Exhibit 60 at A1735.) These agreements also raise concerns about producing information such as trade secrets and confidentiality and privacy rights of third parties. See The Sedona Principles, Principle 10, comment d. (Exhibit 42 at A1398.)

D. The Limited Court Guidance Regarding Electronic Discovery.

Despite the numerous issues that arise due to the advent of electronic discovery, there are no published decisions in Missouri that give specific guidance as to how the current Missouri Rules of Civil Procedure apply to requests for electronic information. Currently, Missouri Supreme Court Rule 56.01(b) allows discovery of only "relevant" documents that are "not privileged." Mo. S. Ct. R. 56.01(b). This Rule applies to all documents – electronic or paper. A document is not more discoverable simply because it is in electronic form. Irrelevant documents and privileged documents, in whatever form they are stored, are not discoverable. See e.g., Byers, 2002 U.S. Dist. LEXIS 9861, at *32 ("these e-mails must be scanned for both relevance and privilege").

Under the current rules, inquiring into whether a document is relevant and privileged, however, is only the first step. If the answer to that inquiry is that the

documents are relevant and they are not privileged, the court must also consider whether the document should not be produced despite the fact that it is discoverable. Missouri Rule 56.01(c) allows a party to request that discovery of relevant, non-privileged documents either not be had or only be had under certain circumstances in order to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” In determining whether the documents should be produced, the courts must “balance the need of the interrogator to obtain the information against the responding party’s burden in furnishing it.” State ex rel. MacDonald v. Franklin, 149 S.W.3d 595, 598 (Mo. Ct. App. 2004). A court’s ability to issue protective orders should also extend to electronic documents.

While it may seem obvious that only relevant and non-privileged documents, including electronic discovery, are discoverable, and that a court can apply protective orders regarding production of electronic documents, the trial court did not apply these standards to BP’s production of electronic documents. The trial court’s actions completely disregard the current rules of discovery by requiring production of irrelevant e-mails and attachments that have not been reviewed for privilege, confidentiality or privacy concerns.

I. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE OCTOBER 12, 2004, AND FEBRUARY 25, 2005, ORDERS REQUIRING BP TO PRODUCE APPROXIMATELY 200,000 E-MAILS THAT DID NOT CONTAIN A SEARCH TERM BECAUSE THE E-MAILS ARE NOT RELEVANT TO THE SUBJECT MATTER OF THE PENDING ACTION, AND ARE THUS NOT SUBJECT TO DISCOVERY BECAUSE BP’S SEARCH TERM METHODOLOGY CONSTITUTES A REASONABLE EFFORT TO ENSURE THAT ALL RELEVANT E-MAILS WERE PRODUCED UNDER RULE 56.01.

A. Standard of Review.

Usually, a trial court’s decision regarding application of the discovery rules is reviewed for an abuse of discretion. See, e.g., State ex rel. Ford v. Nixon, 160 S.W.3d 379, 380 (Mo. 2005). The situation before this Court is unique, however, because the trial court, rather than misapplying rules, chose not to apply the discovery rules. Thus, the inquiry into whether the trial court’s Orders were correct is either a completely legal question, or is at least an inquiry that contains mixed questions of law and judicial discretion.

First, the trial court ordered production of all 200,000 e-mails – with no limitations – that BP had deemed irrelevant. In cases in which an order does not limit the production of documents to those that were relevant and material, “the order evidenced an excessive, unreasonable and oppressive exercise of judicial authority beyond the jurisdiction of respondent.” State ex rel. Clemens v. Witthaus, 360 Mo. 274, 283 (Mo. 1950). The trial

court, rather than abusing its discretion, entered Orders that, legally, it had no jurisdiction to enter. This warrants a de novo review. See Baldwin v. Director of Revenue, 38 S.W.3d 401, 405 (Mo. 2001) (holding that this Court reviews legal issues de novo). Any blanket order requiring production of all documents without limitation is an abuse of discretion as a matter of law.

Second, the 200,000 e-mails that BP has been ordered to produce did not hit on any of the search terms BP used to find potentially relevant documents within its e-mail collection, making them legally irrelevant. Plaintiffs, however, claim that BP's use of search terms to determine relevancy was legally improper, and instead argue that BP should be required to review each and every e-mail that BP downloaded from its employees. In resolving this issue, the Court must determine whether using search terms is a legally appropriate methodology of searching for relevant documents in an electronic review. This inquiry of whether a certain action is legally sufficient to meet a party's discovery obligations is a question of law that should be based upon a de novo review, with the burden of proving relevancy on Plaintiffs. See Baldwin, 38 S.W.3d at 405 (holding that this Court reviews legal issues de novo); MacDonald, 149 S.W.3d at 597 (holding that, although the burden of persuasion is on relator, "[t]he party seeking

discovery shall bear the burden of establishing relevance”).¹⁰

Third, some courts have held that determining whether documents are relevant, and are thus within the scope of discovery, is not an inquiry that involves a court’s discretion at all:

trial court discretion is pertinent only where the information sought is within the scope of discovery. Discretion plays no role where a discovery inquiry is clearly outside the scope of discovery.... Discretion is involved where an inquiry which is within the scope of discovery runs against an interest in privacy or against an assertion that the proposed discovery is burdensome.

State ex rel. Creighton v. Jackson, 879 S.W.2d 639, 641 (Mo. Ct. App. 1994); see also State ex rel. Peirson v. Griffin, 838 S.W.2d 490, 491-92 (Mo. Ct. App. 1992) (stating that a trial court exceeds its jurisdiction, as opposed to abuses its discretion, when it orders production of documents that are not within the proper scope of discovery). Thus, any review of BP’s use of search terms, whether regarding their use in the first place or regarding the sufficiency of the terms, should be reviewed de novo.

¹⁰ Other cases have noted that the burden of proving irrelevancy to the appellate court rests on relator. See, e.g., State ex rel. St. John’s Regional Medical Center v. Dally, 90 S.W.3d 209, 218 (Mo. 2002). Thus, in the alternative, BP’s arguments below prove that the documents are irrelevant.

Some courts, not faced with the unique circumstances currently before this Court, have not made this distinction between reviewing a trial court's determination as to whether a group of documents is within the scope of discovery based on a de novo instead of an abuse of discretion review. See Ford v. Messina, 71 S.W.3d at 607 (holding that, because the parties conceded relevance, the judge did not abuse discretion in holding that material was discoverable). Thus, alternatively, this Court should review the trial court's implication that BP's search terms were insufficient under an abuse of discretion standard (although BP still contends that the propriety of the use of search terms in the first place is a legal issue to be decided de novo). Although trial judges have broad discretion in administering the discovery rules, "that discretion has never been viewed as unlimited." State ex rel. Kawasaki Motors Corp. v. Ryan, 777 S.W.2d 247, 252 (Mo. Ct. App. 1989). In determining whether BP's search terms are sufficient, this Court must consider "questions of ... relevance and tendency to lead to discovery of admissible evidence." Id. (citations omitted).

In this case, the trial court abused its discretion as a matter of law by ordering production of documents that are not relevant to the subject matter of the underlying action because they did not contain any of the search terms BP used to locate the relevant documents within its collection of employee e-mail. The record shows that BP's search terms were chosen to be as broad as they could be to locate the relevant documents. It was an abuse of discretion, as a matter of law, to allow discovery of any document that did not contain a search term.

B. Missouri only requires that a party produce relevant documents.

In any type of litigation, it is beyond dispute that only relevant documents need to be produced. Missouri Supreme Court Rule 56.01(b)(1) only allows parties to “obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action” that relates to the claim or defense of the party seeking discovery. Rule 56.01(b)(1). See also Ford v. Messina, 71 S.W.3d at 606 (holding that discovery only allows access to “relevant, non-privileged information, while minimizing undue expense and burden”). Parties cannot be allowed to cast the discovery net so far and wide that it seems the party is on a fishing expedition “designed to drain the pond and collect the fish from the bottom.” State ex rel. The Upjohn Co. v. Dalton, 829 S.W.2d 83, 85 (Mo. Ct. App. 1992). One reason for this limitation on discovery is that requiring parties to lawsuits to preserve and produce “every shred of paper” and “every e-mail or electronic document,” would “cripple large corporations.” Zubulake v. UBS Warburg, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (“Zubulake IV”).

Under Rule 56.01(b)(1), material is relevant if it is “reasonably calculated to lead to the discovery of admissible evidence.” State ex rel. Stecher v. Dowd, 912 S.W.2d 462, 464 (Mo. banc 1995). Although broadly defined, if the relevancy of a document or class of documents “seems remote and tenuous in light of the ultimate factual issue,” discovery will not be allowed. MacDonald, 149 S.W.3d at 599 (citation omitted). Any document that does not fit this definition is simply not discoverable, and a court cannot order production of a document that is not relevant. Creighton, 879 S.W.2d at 641 (stating that

court lacks discretion to order production of documents that are outside the scope of discovery).

These rules apply to electronic discovery just as they apply to paper discovery. An electronic document is not more discoverable simply because it is in electronic form. Jones v. Goord, No. 95 Civ. 8026 (GEL), 2002 U.S. Dist. LEXIS 8707 at *17 (S.D.N.Y. May 16, 2002) (first step in determining whether databases should be produced “is deciding whether the requested material is discoverable, that is, whether it is relevant and not privileged”); see also Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 317 (S.D.N.Y. 2003) (“Zubulake I”) (“electronic documents are no less subject to disclosure than paper records,” thus the requesting party is entitled to discovery of e-mails “so long as they are relevant”) (citations omitted); Lipco Electrical Corp. v. ASG Consulting Corp., No. 8775101, 2004 WL 1949062, at *6 (N.Y. Sup. Ct. August 18, 2004) (“Whether the court is dealing with traditional paper discovery or electronic discovery, the first issue the court must determine is whether the material sought is subject to disclosure as ‘material and necessary’ in the prosecution or defense of the action.”).

Because only relevant documents are discoverable, courts cannot order unlimited production of electronic documents without any parameters in place to ensure that only relevant documents are produced. State ex rel. Ford v. Nixon, 160 S.W.3d at 381 (holding that “discovery without temporal, geographic or subject matter limitation is overbroad”); see, e.g., Wright v. AmSouth Bancorp., 320 F.3d 1198 (11th Cir. 2003) (holding that a request for every word processing file “created, modified and/or accessed” by five employees for a two and a half year period did not reasonably limit the discovery

to relevant documents). The trial court's Orders are even broader than the requests at issue in the Wright case and require BP to produce e-mails for 61 BP employees over approximately a ten-year period. The trial court's Orders are based on the trial court's misconceptions about the relevancy of BP's employee e-mails.

C. The trial court's October 12, 2004, and February 25, 2005, Orders, which are based on incorrect assumptions regarding the relevancy of the 200,000 e-mails, allow unlimited discovery with no parameters in place to ensure that documents produced are relevant.

The trial Court's Orders require BP to produce, without limitation, every e-mail that 61 BP employees wrote or received without any consideration as to whether the e-mails are actually relevant to the underlying action. The trial court's Orders are based on the incorrect assumption that the 200,000 e-mails are potentially relevant. In the original October 12, 2004 Order, the trial court stated, "Defendant eventually identified 501,361 e-mails and attachments as being potentially responsive to the requests to produce."

(Exhibit 27 at A704 (emphasis added).)¹¹ This is an incorrect statement, and was one of the reasons BP filed its Motion for Reconsideration. The 501,000 e-mails were never identified by BP as “potentially responsive.” The 501,000 e-mails and attachments were the universe of e-mails captured when BP downloaded all e-mails from the computers of the 61 “key players.” These included e-mails concerning topics that BP knew would have absolutely nothing to do with this lawsuit. BP only downloaded all of the e-mails in order to ensure that all potentially responsive e-mails that would be contained within that set of 501,000 were preserved.

This procedure for preserving the e-mails is the equivalent of removing all of the papers in an employee’s office and taking them back to counsel’s law offices simply to preserve them. No court would force the party to produce all those paper files simply because they had been removed from the employee’s office; rather, only those files that counsel determined were responsive to the opposing party’s discovery requests and not

¹¹ Plaintiffs have previously asserted that the trial court found BP’s use of search terms “belated and unfair.” (Exhibit 52 at A1553.) The trial court never made such a finding. The only finding the trial court made was that the 501,000 e-mails were “potentially responsive.” (Exhibit 27 at A704.) By ordering BP to produce all 501,000 e-mails, this Court can infer that the trial court either misunderstood the procedures or it rejected the use of search terms as an appropriate method for locating responsive documents among millions of pages of electronic communications, but it cannot necessarily infer that the trial court found the use of search terms “belated and unfair.”

privileged would be produced. The same principle applies to electronic documents. The difference lies in the method counsel uses to determine whether the documents are relevant, which is discussed in the next section. Because a party downloaded e-mails and attachments to preserve them, however, does not mean that all of the e-mails are responsive to discovery requests.

In its October 12, 2004 Order, the trial court referenced Plaintiffs' argument that "the mailbox of one person who received a 'cc' copy of relevant information was not included" in the list of mailboxes that BP downloaded as a reason for ordering the production of the additional 200,000 e-mails. (Exhibit 27 at A705.) The trial court's reasoning is flawed. The additional 200,000 e-mails were downloaded from the same mailboxes of the same employees as the 301,000 e-mails that were produced – the additional e-mails are simply those same employees' e-mails that did not hit a search term. Ordering BP to produce the additional 200,000 e-mails will not yield any relevant e-mails from an employee who was not included in the original search, unless that employee received or was copied on an e-mail that was sent or received by one of the original 61 people whose e-mail was downloaded.

The trial court's incorrect assumptions that it used to support its Orders cannot withstand scrutiny. One cannot reasonably maintain that every one of the 501,000 e-mails BP downloaded is relevant. In addition, the production of the additional 200,000 e-mails will not magically produce e-mails written or received by a BP employee who did not have his electronic mailbox searched in the first place. The trial court did not give any other explanations of the reasons it believed the 200,000 e-mails are relevant to the

underlying action. Thus, the only explanation that can be inferred from the Orders, although the trial court did not actually state it, is that the trial court either misunderstood the procedures or it did not accept the search term methodology used by BP to determine which documents are relevant.

D. As a matter of law, BP used a reasonable method for locating relevant documents in cases involving electronic discovery, and the trial court erred in ordering production of documents that BP reasonably determined are irrelevant.

1. The standard for production of relevant documents is one of reasonableness.

In a normal paper review, “the challenge is to conduct a reasonable search to determine where relevant documents may be located, and thereafter to ensure that copies of any relevant documents are maintained for purposes of the litigation.” Bennett, 15 No. 3 Prac. Litigator at 10. (Exhibit 61 at A1812.) The producing party, however, does not have to conduct an exhaustive search for every shred of paper that might possibly be relevant. See State ex rel. Ford Motor Co. v. Westbrooke, 151 S.W.3d 364, 369 (Mo. 2004) (“Missouri’s litigators are reminded that the discovery process was not designed to be a scorched earth battlefield”) (citation omitted). Rather, the party must only conduct a “reasonable” search to find responsive documents. See May v. IRS, 85 F. Supp. 2d 939, 945 (W.D. Mo. 1999) (noting that to obtain summary judgment in a Freedom of Information Act case, the agency must only show that its search for the requested documents was “reasonably calculated to uncover all relevant documents. And while the

search must be reasonable, it does not have to be exhaustive. The issue is not whether any further documents might conceivably exist but whether the government's search for responsive documents was adequate.") (citations omitted).

The same "reasonableness" standard applies to production of electronic discovery. See The Sedona Principles, comment 8.a. (Exhibit 42 at A1392.) In an electronic review, however, it becomes even more unlikely that a producing party will be able to find every single relevant document because the sheer volume of electronic documents means that it will likely be impossible for counsel to review all of them without a search method that is specifically tailored to electronic documents. See Zubulake V, 2004 U.S. Dist. LEXIS 13574, at *34-35. The issue then becomes what is a "reasonable" method for searching for relevant documents in the context of electronic discovery.

2. Keyword searching is a reasonable method to locate relevant documents in an electronic review.

Missouri courts have not addressed adequate procedures for determining which documents are relevant in the context of electronic discovery. Several federal courts, however, have addressed this issue and this Court can look to those courts for guidance. Where there are "no cases decided by [Missouri] appellate courts that have dealt with [a] precise issue, [the court] will look to the decisions of the federal...courts, which have addressed the issue, as being persuasive." See Block Props. Co. v. American Nat'l Ins. Co., 998 S.W.2d 168, 174 (Mo. Ct. App. 1999). In addition, numerous treatises and articles have discussed this area of law and can provide guidance to this Court.

Although there are many different procedures that have been utilized by other courts and are contemplated by various authors of articles and treatises, a consensus emerges among those who have studied the issue of electronic discovery: the use of search terms to determine which e-mails or other electronic documents are relevant to a lawsuit is an accepted methodology for responding to discovery requests. BP is not aware of a single source that has determined that search terms are an inappropriate tool for locating relevant documents when electronic documents are at issue.

Plaintiffs, however, have taken the position that in order for BP to fully comply with its duty to respond to Plaintiffs' discovery requests, BP must review every single e-mail written or received over the past ten years by the key employees whose emails were downloaded by BP. According to Plaintiffs, if BP does not want to conduct a review of every document, it should simply provide all of the documents to Plaintiffs and allow Plaintiffs unlimited access to BP's employee e-mails. This is simply unreasonable.

The Zubulake V court recognized that it would be unreasonable to review every document for relevance due to the potentially large numbers of e-mails, and suggested a procedure parties could use to search the computers of the "key players" (persons who may have relevant information) for potentially responsive documents:

To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each "hit." Although this

sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive documents. When the opposing party propounds its document requests, the parties could negotiate a list of search terms to be used in identifying responsive documents, and counsel would only be obliged to review documents that came up as “hits” on the second, more restrictive search. The initial broad cut merely guarantees that relevant documents are not lost.

Zubulake V, 2004 U.S. Dist. LEXIS 13574, at *34-35.

The Zubulake V method is just one suggested protocol. For example, in Wiginton v. CB Richard Ellis, the court suggested that the producing party could have had its Information Technology department filter out spam and then run keyword searches for words related to the cause of action in order to preserve relevant e-mails for production. No. 02C6832, 2003 WL 22439865, at *6 (N.D. Ill. Oct. 27, 2003). The court chastised the producing party for failing to do this. Id. In a recent decision, one district court noted that, if a responding party was “unwilling to surrender” all of its documents without conducting any type of review of the documents first, “there may be a technical methodology available to search them to narrow the search to only the pertinent files.” J.C. Associates v. Fidelity & Guaranty Ins. Co., No. 01-2437 (RJL/JMF), 2005 WL

1570140, at *2 (D.D.C. July 1, 2005). The court stated that using keyword searches for two key words would “permit the reasonable elimination” of irrelevant documents. Id.

Other courts have similarly held that the producing party should run its own keyword searches to find relevant documents. For example, the court in Zakre v. Norddeutsche Landesbank Girozentrale, citing The Sedona Principles, stated that “a responding party may satisfy its obligation to preserve and produce potentially responsive electronic data and documents by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data most likely to contain responsive information.” No. 03Civ0257 (RWS), 2004 WL 764895; 2004 U.S. Dist. Lexis 6026, at *3 (S.D.N.Y. April 9, 2004) (citing The Sedona Principles, Principle 11 (Exhibit 42 at A1400.) Bennett, 15 No. 3 Prac. Litigator at 11 (Exhibit 61 at A1812-1813) (stating that one way to conduct a search for relevant electronic documents would be for the producing party to conduct a search, and then “invite opposing counsel to suggest any additional search terms” that could have been used); The Sedona Principles, Principle 11 and comment 11(a) (Exhibit 42 at A1400) (noting that use of electronic tools and processes such as key “concept” or word searches is “a reasonable approach when dealing with large amounts of electronic data”).

Other courts have stated that the parties could confer and determine which keyword searches should be used. Alexander v. FBI, 188 F.R.D. 111, 117 (D.D.C. 1998) (holding that the plaintiffs could discuss “targeted and appropriately worded searches of [electronic documents] for a limited number of individuals” with the FBI in order to find responsive documents); see also American Bar Association, Amendments to Civil

Discovery Standards (August 2004), § VIII, Standard 31(a)(xi) and comment (noting that parties should consider use of key terms or other selection criteria to search potentially responsive and massive amounts of electronic data for discoverable information), (Exhibit 62 at A1830-1833).¹²

Still other courts have stated that the court could impose the search terms on the parties. See, e.g., Dodge, Warren & Peters Ins. Serv., Inc. v. Riley, 105 Cal. App. 4th 1414, 1417 (Cal. Ct. App. 2003) (the parties could “perform automated searches of that evidence under guidelines agreed to by the parties or established by the court”).

Cases involving a government search of computerized data have held that the government should create its own search terms to apply to computers to avoid constitutional issues regarding the Fourth Amendment protections against unlawful searches and seizures. In a case involving a search of a suspected criminal’s computer, the court noted that “computer technology affords a variety of methods by which the government may tailor a search to target on the documents which evidence the alleged criminal activity.” In re Search of 3817 W. West End, First Floor Chicago, Illinois 60621, 321 F. Supp. 2d 953, 959 (N.D. Ill. 2004). Thus, without giving specific instructions on how the government should do so, the court required the government to

¹² These standards recognize that “[e]lectronic discovery injects difficult, expensive and contentious issues into many otherwise routine disputes.” They “are not intended to restate the law or replace existing court rules” but are to serve as guidelines to assist the parties, counsel and the court in civil discovery. (Exhibit 62 at A1819.)

craft search protocol using methods such as key word searches and date range limits in order to conduct a limited review of the computer, and to avoid violating the alleged criminal's Fourth Amendment rights against an unlawful search. Similarly, the Supreme Court of Wisconsin stated that the government could have avoided Fourth Amendment concerns by incorporating a key word search into a subpoena of computer records. In re John Doe Proceeding, 680 N.W.2d 792, 807 (Wis. 2004); see also Commonwealth v. Hinds, 768 N.E.2d 1067, 1071-73 (Mass. 2002) (allowing search of all files in computer only because the search was limited by key terms, and was thus "content based").

Ideally, the search terms should be reasonably limited so that they do not return more electronic information than is actually relevant. The Sedona Principles suggest how to accomplish this goal by stating that "important steps in achieving the goal of reasonably limiting discovery may include collecting data from repositories used by key players rather than generally searching through the entire corporate computer system; defining the set of data to be collected by applying reasonable selection criteria, including search terms, date restrictions, or folder designations; and avoiding collection efforts that are out of proportion to or are inappropriate in the context of a particular litigation." The Sedona Principles, comment 6.b. (Exhibit 42 at A1388).

Numerous courts have placed reasonable limits on e-discovery by limiting the number of search terms that are used to gather relevant data. The court in Proctor & Gamble Co. v. Haugen allowed the requesting party to propose 25 search terms, but stated that any terms that would "yield either general commercial or competitive information or a volume of documentation that would be so extensive as to render the

search unwieldy for any purpose legitimately within the current framework of the litigation” must be excluded. 179 F.R.D. 622, 632 (D. Utah 1998) (citations to a previous order omitted); see also Hagemeyer N. Am., Inc. v. Gateway Data Sci. Corp., 222 F.R.D. 594 (E.D. Wis. 2004) (where the requesting party wanted the defendant to restore and produce numerous backup tapes containing e-mails, the court ordered the requesting party to “file a statement narrowing its search criteria by specifying what e-mails it seeks from [the defendant], including their dates, their subject, their likely content, and their sender” so that a sample could be run from a small number of tapes); Wiginton v. CB Richard Ellis, Inc., No. 02C6832, 2004 WL 1895122 (N.D. Ill. Aug. 10, 2004) (stating that 98 search terms had produced too many e-mails (over 200,000), so the court ordered each party to pick four terms and run those on a sample of back-up tapes in order to determine whether all of the back-up tapes should be searched); In re Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (vacating order that allowed unrestricted access to a database, and criticizing the court because it “did not even designate search terms to restrict the search”); Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., No. 502003CA005045XX(CAI), 2005 WL 679071 (Fla. Cir. Ct. Mar. 1, 2005) (search of electronic documents had been limited by previous “Agreed Order” to running 29 search terms through the e-mails of 36 employees).

Though the courts all used slightly different approaches according to the situation before them, these cases demonstrate that courts uniformly accept the use of search terms. All of these courts held that applying search terms to electronic documents is a reasonable method for determining which documents are relevant to the litigation.

3. BP's use of search terms constituted a reasonable attempt to gather the relevant documents in its e-mail collection.
 - a. BP's initial download of the entire mailboxes of 61 employees in this case exceeded its duty to preserve all relevant documents.

By using search terms, BP conducted a reasonable search to cull the relevant e-mails and attachments from its employees' e-mails. First, BP accessed the computers of 61 BP employees who BP determined were the "key players" in this case and downloaded all of their e-mails. This was the first step BP performed in order to ensure that all of the potentially relevant information that would be contained in the e-mails, along with a substantial amount of irrelevant information, was preserved. (Exhibit 19 at A524, ¶ 2; A540.) By preserving all of the e-mails of its key employees, rather than just those e-mails that contain information regarding the underlying lawsuit, BP's first step exceeded its duty to preserve e-mails that might contain relevant information. See Zubulake IV, 220 F.R.D. at 217-18 (finding that a party does not need to retain "every shred of paper, every e-mail or electronic document" in order to meet its obligation to preserve data for a lawsuit. Rather, the party only needs to retain relevant documents from the key players in the lawsuit.).

- b. BP's creation and application of the search terms was a reasonable method for finding relevant e-mails.

After preserving all the e-mails, BP then drafted a list of 428 search terms that were gleaned directly from Plaintiffs' discovery requests. (Exhibit 19 at A524, ¶ 2;

A540.) BP also added its own terms, not mentioned in the discovery requests, that it believed would return responsive information. (Id.) When the search terms were applied to the key players' e-mails, approximately 307,000 items contained one of the search terms. (Id.; Exhibit 28 at A760, ¶ 8.)

Plaintiffs have previously argued that BP's procedures were improper because BP did not consult Plaintiffs while drafting the search term list. (Exhibit 52 at A1567-1568.) As the producing party, however, BP had every right to determine which terms it thought would retrieve responsive documents on its own without input from Plaintiffs. Numerous courts have held that the producing party should be in charge of its own production. See Wiginton, 2003 WL 22439865, at *6 (suggesting that the producing party could have had its IT department filter out spam and then run keyword searches for words related to the cause of action in order to preserve relevant e-mails for production); Zubulake I, 217 F.R.D. at 315 (the producing party's "personnel could easily run a search for e-mails containing [plaintiff's name] that were sent or received by [her employers that she accused of harassment]"); Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) ("the producing party unilaterally decides on the review protocol. When reviewing electronic data, that review may range from reading every word of every document to conducting a series of targeted key word searches") ("Zubulake III"); The Sedona Principles, Principle 6 (Exhibit 42 at A1388) ("Responding parties are best situated to evaluate the procedures, methodologies and techniques appropriate for preserving and producing their own electronic data and documents."); In re John Doe Proceeding, 680 N.W.2d 792 at 810 (in a concurring opinion written to emphasize the

importance and “special problems” of electronic discovery issues, one judge notes that responding parties are in the best position to determine the methodology they will use to produce their relevant documents). In fact, BP’s procedure is the one suggested by Steven C. Bennett in an article he wrote that was published by the American Law Institute suggesting that the producing party could work in conjunction with the requesting party by describing “the search method it has used (or proposes to use), and [inviting] opposing counsel to suggest any additional search terms required to capture and preserve essential information.”). Bennett, 15 No. 3 Prac. Litigator at 11 (Exhibit 61 at A1812-1813).

In their Answer to Relator’s Petition for Writ of Prohibition and/or Petition for Writ of Mandamus, Plaintiffs state, “[e]ven if BP had given plaintiffs the opportunity to suggest search terms, plaintiffs are not sufficiently familiar with the slang, jargon, acronyms, and abbreviations that BP uses on a regular basis to ensure a thorough and complete search.” (Exhibit 59 at A1683, ¶ 85.) This is exactly why the responding party, BP, is the appropriate party to determine the search criteria it uses to determine relevancy. BP is intimately familiar with the “slang, jargon, acronyms and abbreviations” it uses, and in fact included many terms and acronyms that did not appear in Plaintiffs’ discovery requests because BP knew they would return relevant documents. (Exhibit 19 at A524, ¶ 2; A540.)

Moreover, Plaintiffs were actually given the opportunity to comment on the search terms. On August 10 and 11, 2004, BP provided Plaintiffs’ counsel with lists showing the employees whose e-mails were searched, the search terms used, the number of e-

mails each search term “hit,” the number of e-mails sent between employees, and the subject lines of the e-mails, and requested that Plaintiffs’ counsel advise BP if Plaintiffs believed any of the search terms could be eliminated or if Plaintiffs’ counsel had any questions regarding the e-mail search performed by BP. Plaintiffs’ counsel did not add or remove any names or search terms. (Exhibit 28 at A790-807.) If Plaintiffs thought other search terms should have been added to the list, they should have notified BP of that fact, as they were requested to do.

In addition, the search term protocol was the same protocol that BP had used in two similar pricing cases with Plaintiffs’ counsel, except that BP used more than twice as many search terms in this case than it had in the previous cases. (Exhibit 19 at A525, ¶ 4; A530-539) compare to Atlanta search terms (Exhibit 28 at A782-785). Although Plaintiffs’ counsel may have been unaware of BP’s search protocol in those cases, they never complained that BP had not produced all of its relevant documents. Despite their claim that they are not familiar with BP’s “jargon,” Plaintiffs’ attorneys’ involvement in these two cases demonstrates that they are very knowledgeable about BP’s “jargon” and had an adequate opportunity to notify BP of any inadequacies in its search term methodology. BP thus had no reason to think that Plaintiffs’ counsel would object to the use of search terms in this case.

The first time that Plaintiffs raised any objection to the search term methodology was on September 7, 2004, in their Motion for Sanctions. (Exhibit 23 at A566-567.) Before filing the motion, Plaintiffs had made no attempt to meet and confer on the issue as required by the local court rules. See Local Rule 33.5 (“Court will not hear oral

argument nor take under submission any ... motion for sanctions to enforce discovery, unless there is filed with the Court, together with the notice of hearing, a certification signed by the attorney for the party calling for the hearing which states that it has attempted to discuss the matter with opposing counsel in [a] good faith effort to resolve the disputed issues.”) (Exhibit 25 at A635-641).

Even in this motion, however, Plaintiffs did not cite specific concerns they had regarding the search, but merely stated that BP performed the search without their input. (Id.) Plaintiffs did not voice any substantive concerns regarding the search terms until November 16, 2004, in their response to BP’s Motion for Reconsideration of the Court’s October 12, 2004 Order. (Exhibit 30 at A1122-1123.) This was approximately three months after Plaintiffs were provided with the search terms. Plaintiffs should be estopped from raising objections to BP’s method three months after they were asked to comment on those methods because, in the meantime, BP had expended time and money to produce the e-mails, under the impression that the search terms were acceptable to Plaintiffs. See, e.g., Moore v. Weeks, 85 S.W.3d 709, 721 (Mo. Ct. App. 2002) (stating that the “doctrine of equitable estoppel seeks to foreclose one from denying his own expressed or implied admissions – which can include conduct or lack of conduct – which have been relied upon by another in good faith”).

In addition, some of the terms Plaintiffs now argue should be added, such as “retail peer group,” would have been retrieved in the search because the search terms included the phrase “peer group.” (Exhibit 19 at A533.) Plaintiffs also point out that one of the Plaintiffs’ names was misspelled. This, however, would almost certainly not cause

any e-mails concerning that Plaintiff to be withheld because BP's search terms included the address of his stations and the numbers that BP uses to identify dealers and stations. In e-mails, BP very rarely refers to any dealer only by his name; rather, dealers are usually referred to by, or at least in conjunction with, an identifying number in order to avoid any confusion.

BP's list of search terms was a reasonable effort to determine which documents in a very large document review are relevant. If anything, BP's search was too broad – rather than too narrow – as Plaintiffs are claiming. BP used 428 search terms. In most cases, as discussed above, the courts attempted to limit the number of search terms that could be used to a much smaller number in order avoid terms that would “yield either general commercial or competitive information or a volume of documentation that would be so extensive as to render the search unwieldy for any purpose legitimately within the current framework of the litigation.” Proctor & Gamble Co., 179 F.R.D. at 632 (allowing the requesting party to use only 25 search terms); see also Coleman (Parent) Holdings, Inc., 2005 WL 679071, at *1 (search of electronic documents had been limited by a previous “Agreed Order” to running 29 search terms through the e-mails of 36 employees). In the few cases where numbers of search terms are mentioned, the most search terms BP is aware of any parties using is 98. See Wiginton v. CB Richard Ellis, Inc., 2004 WL 1895122, at *1 (when 98 terms returned over 200,000 e-mails, the court then required the parties to choose only eight terms (four per party), in order to run a sample to see what type of documents were returned).

BP's decision not to consult Plaintiffs before running the search, while not the only method BP could have chosen, is an accepted method of conducting keyword searches. In addition, many of the cases regarding whether the parties should jointly create the search term list are federal cases, not Missouri cases. The Federal Rules of Civil Procedure at Rules 16(b) and 26(f) require that parties discuss matters likely to arise in discovery. The Proposed Federal Rules specifically require such a discussion in the context of electronic discovery. (Exhibit 60 at A1724-1725; A1729-1731.) The Missouri Rules of Civil Procedure, however, do not contain a requirement that parties meet to discuss discovery issues in advance of the commencement of discovery. Although the federal cases can offer guidance on how to handle the difficult situations that arise with the advancement of electronic discovery, the Missouri Rules of Civil Procedure will govern any procedural issues, such as whether the parties must conduct discovery conferences to determine how the producing party will determine whether its documents are relevant to the lawsuit.

- c. BP is not required to review the 200,000 e-mails that did not hit on a search term.

The e-mails that contained one of BP's search terms are the only e-mails that are potentially relevant to this lawsuit. Almost all of those e-mails have been produced. As the Zubulake V court noted, "counsel would only be obliged to review documents that came up as 'hits' on the second, more restrictive search" that was designed to retrieve relevant documents from a larger pool of documents. Zubulake V, 2004 U.S. Dist. LEXIS 13574, at *34-35. In this case, therefore, only the 307,000 e-mails and

attachments that contained search terms were potentially relevant. BP reduced the number of e-mails to approximately 301,000 when BP conducted a more detailed review of the e-mails by reviewing the subject lines of the e-mails and removing all junk mail and e-mails that were related to a different geographic area than the St. Louis area or concerned an irrelevant subject matter. (Exhibit 28 at A760, ¶¶ 8, 9.)¹³ The 301,000 potentially relevant e-mails that remained after this review were either produced or listed in BP's privilege log after BP conducted a cursory privilege review of the documents. BP had no obligation to review any of the remaining 200,000 e-mails that did not contain a search term or that were removed because of the e-mail's subject line because BP had already conducted a reasonable review for relevancy by applying the search terms. These non-relevant e-mails are the very e-mails that the trial court has ordered BP to produce.

Although it is their burden to do so, Plaintiffs have failed to show that BP's search methodology for locating discoverable documents was improper. See MacDonald, 149 S.W.3d at 597 (although the burden of persuasion is on relator, the "party seeking discovery shall bear the burden of establishing relevance").¹⁴

¹³ BP asked Plaintiffs to conduct the same sort of review of the subject lines and search terms, yet they chose not to do so. (Exhibit 28 at A790-807.)

¹⁴ Alternatively, BP has shown that the trial court abused its discretion in determining that the e-mails should be produced because BP's search term methodology is an accepted method of determining relevancy.

The search term methodology of searching for relevant materials is not a perfect system, and it is possible that some relevant e-mails may not have contained a search term. The method BP used, however, is an approved method of searching for relevant electronic documents, as applied in federal case law and other authorities, and there “is no principled reason to require more intrusive efforts merely because the party seeking discovery is suspicious of the efforts undertaken by the producing party.” The Sedona Principles, comment 6.a (Exhibit 42 at A1388) (citing McCurdy Group, LLC v. American Biomedical Group, Inc., 9 Fed. Appx. 822, 831 (10th Cir. 2001)).

Short of reviewing every single page of more than one half million e-mails, there is no method other than using search terms that BP could have used to locate non-privileged and responsive electronic documents. Plaintiffs certainly have not offered any suggestions other than to compel BP to produce them all, regardless of relevance.

E. This Court should adopt a bright-line rule that using search terms is an acceptable method for determining relevancy in an electronic document review.

If the trial court’s Orders stand, as Plaintiffs suggest they should, the reasoning behind those Orders would have to apply to both parties. That would mean that Plaintiffs would have to give BP all of their own e-mails, regardless of whether the e-mails were irrelevant, personal, confidential or privileged. Plaintiffs would have to produce all of them without any review by their counsel. Surely, they would object to such a request (as they should), just as BP objects to what the trial court has ordered it to produce.

To avoid the unlimited production of e-mails in all cases by all parties, as the trial court would do, this Court should adopt a bright-line rule that, when electronic discovery is at issue, the parties need not review every single document for relevancy. Rather, the use of appropriate search terms to determine which documents are potentially relevant satisfies the producing party's obligation to conduct a reasonable search for relevancy. BP acknowledges, of course, that if a party knows about a responsive, non-privileged document that did not hit on a search term, that document must also be produced to the opposing party.

In addition, this Court should hold that it is acceptable for the producing party to determine the criteria for its search terms on its own, without any input from the opposing party, should it wish to conduct its discovery in this manner. The burden would then fall on the opposing party to prove that the terms were inadequate and that they have not received relevant documents.

II. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE OCTOBER 12, 2004, AND FEBRUARY 25, 2005, ORDERS REQUIRING BP TO PRODUCE APPROXIMATELY 200,000 E-MAILS BECAUSE THE ORDERS EVISCERATE THE ATTORNEY-CLIENT PRIVILEGE IN THAT THEY REQUIRE BP TO PRODUCE E-MAILS WITHOUT ALLOWING BP TO REVIEW THOSE E-MAILS FOR PRIVILEGE AND ONLY PROTECT THAT PRIVILEGE AT TRIAL, NOT THROUGHOUT THE DISCOVERY PROCESS.

A. Standard of Review.

By stating that privileged documents are not subject to discovery, Rule 56.01(b) assumes that parties will have the chance to review their documents for privilege before production. The trial court in this case denied BP the chance to review its documents for privilege. The Manual for Complex Litigation notes that it is inappropriate to allow unlimited access to electronic documents to the opposing party because it “would compromise legally recognized privileges, trade secrets, and often the personal privacy of employees and customers.” The Manual for Complex Litigation, (Fourth) § 11.446 (2004) (emphasis added).

Application of the attorney-client privilege is a matter of law, not a matter of judicial discretion. State ex rel. Chase Resorts, Inc. v. Campbell, 913 S.W.2d 832, 838 (Mo. Ct. App. 1995). Thus, this Court must conduct a de novo review of the trial court’s Order requiring BP to produce the e-mails on CD ROM discs without giving BP the opportunity to conduct a privilege review. Baldwin v. Director of Revenue, 38 S.W.3d at

405 (holding that this Court reviews legal issues de novo); Wunsch v. Sun Life Assurance Co. of Canada, 92 S.W.3d 146, 155 (Mo. Ct. App. 2002) (holding question of whether statement was privileged was question of law reviewed de novo).

B. Missouri affords strong protection to documents that are protected by the attorney-client privilege.

The attorney-client privilege exists to protect “confidential communications between an attorney and client concerning representations of the client.” State ex rel. Polytech Inc. v. Voorhees, 895 S.W.2d 13, 14 (Mo. 1995) (citations omitted). In State ex rel. Great American Ins. Company v. Smith, 574 S.W.2d 379 (Mo. 1978), this Court “adopted an approach to the attorney-client privilege that recognizes the confidentiality of communications between attorney and client as a fundamental societal policy, to which disclosure is the exception.” State ex rel. Friedman v. Provaznik, 668 S.W.2d 76, 78 (Mo. 1984). This Court, using the American Law Institute’s definition, stated that a “confidential communication” means “information transmitted by a voluntary act of disclosure between a client and his lawyer in confidence and by a means which, so far as the client is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of the information or the accomplishment of the purpose for which it was transmitted.” Great American Ins. Co., 574 S.W.2d at 384. This broad definition includes all communications, including those that are not technically advice, but are “opinions formed to date,” an “analysis of what is known to date of the situation” or a “discussion of additional avenues to be pursued.” Id. at 384-85.

This Court has adopted the position that “[t]he relationship and the continued existence of the giving of legal advice by persons accurately and effectively trained in the law is of greater societal value...than the admissibility of a given piece of evidence in a particular lawsuit. Contrary to the implied assertions of the evidence authorities, the heavens will not fall if all relevant and competent evidence cannot be admitted.” See Peabody, 863 S.W.2d at 607 (citing Great American Ins. Co., 574 S.W.2d at 383). This Court therefore made a conscious decision to treat the attorney-client privilege as broadly as necessary in order to accomplish the goal of keeping a veil of secrecy around all communications made between an attorney and his client. Great American Ins., 574 S.W.2d at 383. This protection is so strong that Missouri courts take the stance that the attorney-client privilege “is absolute in all but the most extraordinary cases.” See State ex rel. Ford Motor Co. v. Westbrooke, 151 S.W.3d 364, 366 n.2 (Mo. 2004).

C. The trial court erred in compelling BP to waive its opportunity to assert the attorney-client privilege by simply stating that BP may preserve its right to assert a privilege at trial.

When a party asserts a privilege, the analysis of whether such document should be produced or protected must occur before production of documents because “[o]nce the proverbial bell has been rung, its sound can neither be recalled nor subsequently silenced.” Enright, 106 S.W.2d at 855 (concerning statutory peer review privilege); see also State ex rel. Am. Econ. Ins. Co. v. Crawford, 75 S.W.3d 244, 246 (Mo. 2002) (using same analogy regarding work product privilege). The trial court’s Orders, however, contemplate protection of privileged documents only after they have already been

produced. The trial court attempted to “protect” BP from disclosure of its privileged documents by stating:

[T]hese documents must be produced, but by producing the materials, BP will not waive any objections based at trial on attorney/client privilege as to any privileged document that may be included in such production, nor any objections as to relevancy.

(Exhibit 39 at A1221, n.1.)

The trial court attempted to “protect” BP by stating that BP could assert the privilege at trial if privileged documents were produced pursuant to the Orders. (Exhibit 39 at A1221, n.1.) The “protection” given by the trial court, however, is illusory – the attorney-client privilege exists to protect against disclosure in the first place. See Mo. Sup. Ct. R. 56.01(b)(1) (stating that only documents that are not privileged are subject to discovery); see also Cain v. Barker, 540 S.W.2d 50, 52 (Mo. 1976) (“The language of rule 56.01(b) authorizes discovery of matters not privileged. This necessarily means that privileged matters, such as communications between attorney and client, are not discoverable....”).

The trial court has misapplied the law concerning the attorney-client privilege. BP is not aware of any appellate court that has ever held that a trial judge has the right to force a party to produce privileged documents with only the “protection” of the court’s statement that the party may later assert the privilege at trial, especially where the “protection” affords as little protection or no protection as that given by the trial court in

this case. Once the document has been disclosed, the damage has been done. See, e.g., State ex rel. Peabody Coal Co. v. Clark, 863 S.W.2d 604, 608 (Mo. 1993) (“Once the privilege is discarded and the privileged material produced, the damage to the party against whom discovery is sought is both severe and irreparable.”); see also St. Louis Little Rock Hospital, Inc. v. Gaertner, 682 S.W.2d 146, 148-49 (Mo. 1984) (“If the matters sought to be discovered are protected from discovery by reason of privilege or work product, then disclosure to plaintiffs would violate the confidentiality essential to maintaining a privilege, and no remedy by appeal could restore that confidentiality.”). A trial judge cannot protect against non-disclosure of privileged documents by ordering those very documents to be disclosed.

In fact, the Second Circuit specifically held otherwise when a district court ordered a party to produce privileged documents under a protective order “purportedly designed to safeguard [the producing party’s] privileges” by providing that “production of the minutes would not constitute waiver of the attorney-client, work-product, or any other privilege.” In Re Dow Corning Corp., 261 F.3d 280, 282-83 (2d Cir. 2001). The court stated:

We have found no authority, nor [has] the [requesting party] supplied us with any, that holds that imposition of a protective order like the one issued by the district court permits a court to order disclosure of privileged attorney-client communications. **The absence of authority no doubt stems from the common sense observation that such a**

protective order is an inadequate surrogate for the privilege. If an adverse party is provided access to privileged material, then “a pertinent aspect of confidentiality will be lost.”

Id. at 284 (citations omitted) (emphasis added). It is thus clear that a court cannot force a party to produce privileged documents by entering a protective order that purports to protect the privilege.

Another federal court has addressed the precise issue before this Court – the even narrower issue of whether a court can force a party to produce e-mails that may be privileged before the producing party has had a chance to review those e-mails. In Murphy Oil USA, Inc. v. Fluor Daniel, plaintiff sought an order compelling defendant to produce e-mails that were stored on 93 computer back-up tapes. Murphy Oil, No. 99-3564, 2002 U.S. Dist. LEXIS 3196 (E.D. La. Feb. 19, 1996). Defendant did not want to produce the e-mails because the back-up tapes may have contained privileged materials and it would have been prohibitively expensive because it would have cost \$6.2 million and taken six months simply to put the more than two million e-mails into a reviewable format, excluding attorney review time and costs. Id. The court noted that the parties could enter into an agreement whereby defendant would produce the e-mails, but any claim of privilege would not be waived. Similarly to BP in this case, the defendant objected to that procedure, arguing that it would be highly prejudicial for plaintiff to gain access to the back-up tapes, which could contain privileged and irrelevant information.

Despite the fact that the court agreed that the parties *could* enter into a protective agreement, the court held that it *could not force* defendant to enter into such an agreement. The Murphy Oil court specifically stated that a party “must have an opportunity to assert that e-mail is confidential or privileged.” Murphy Oil, 2002 U.S. Dist. LEXIS 3196, at *12; see also Rowe Entertainment, Inc. v. The William Morris Agency, Inc., 205 F.R.D. 421, 432 (S.D.N.Y. 2002) (holding “[e]ven with such protections, however, the disclosure of privileged documents cannot be compelled”); J.C. Associates, 2005 WL 1570149 (stating that “defendant justifiably fears that the files contain privileged material” and discussing alternative methods of production if the producing party was unwilling to enter into an agreement regarding privileged documents). To allow defendant the opportunity to conduct a privilege review should it wish to do so, the Murphy Oil court held that defendant could enter into a protective agreement whereby plaintiff would review all of the e-mails, tell defendant which e-mails it thought were relevant and then defendant could review only those e-mails. Or, it could review all the e-mails before plaintiff’s lawyers viewed them, although the court ordered the plaintiff, as the requesting party, to pay the cost of putting the e-mails into a reviewable format to plaintiff.

Various states that have addressed the issues surrounding e-discovery have held that a court cannot order production of the e-mails without first attempting to protect the producing party’s privileged documents from disclosure in discovery. See e.g., Southern Diagnostic Assoc. v. Bencosme, 833 So. 2d 801, 802 (Fla. Dist. Ct. App. 2002) (there must be parameters set in electronic discovery to protect against disclosure of privileged

and confidential material); see also Byrne v. Byrne, 650 N.Y.S.2d 499, 500 (N.Y. Sup. Ct. 1996) (although the court allowed discovery of a husband's computer files in a divorce proceeding, he was first given the chance to conduct a privilege review of the files before production to protect his privileged documents); Dodge, Warren & Peters Ins. Services, Inc. v. Riley, 105 Cal. App. 4th 1414, 1421 (Cal. Ct. App. 2003) (electronic information is discoverable, but producing party would first review for privilege and relevance at requesting party's cost).

The proposed amendments to the Federal Rules of Civil Procedure addressing electronic discovery emphasize this protection by stating in the committee note to Proposed Rule 16(b)(6) that, although the parties may agree to enter into "clawback" agreements where the parties produce documents sight unseen and any privileged documents accidentally produced are returned to the producing party, the new rule "does not provide the court with authority to enter such a case-management order without party agreement." See Report of the Civil Rules Advisory Committee regarding the Proposed Amendments to the Federal Rules of Civil Procedure at the committee note to Rule 16(b), (Exhibit 60 at A1726.) The Advisory Committee notes that parties cannot be forced into these agreements because it is unclear how an agreement of non-waiver would be effective against third parties or in other jurisdictions. (Id. at A1723, 1726.)

These authorities are persuasive that no court can force a party to produce documents by stating that the privilege will not be waived should the party wish to assert it after production. In this case, however, the trial court did exactly that and denied BP the basic right to review its documents for privilege before production.

D. Even if the lower court could force BP to produce its privileged documents subject to a court-imposed “protective order,” the “protective order” at issue is inadequate to protect BP’s right to claim any privilege during discovery.

Even if a court could force BP to produce its privileged documents without review subject to a protective agreement, the “protection” given to BP by the trial court is inadequate and an error of law because it does not offer any protection that would bar Plaintiffs from using the privileged documents during discovery. The Order only protects BP from objecting to the use of the documents at trial. There is no Missouri law that states that giving a party protection from use of a privileged document at trial justifies allowing the opposing party to use such a document during the discovery phase. The trial court’s ruling thus contravenes Missouri law which adamantly protects a party’s privileged documents from disclosure or use at any time.

E. If BP is ordered to produce the 200,000 e-mails, BP must be given an adequate amount of time in which to review its documents for privilege and the minimum 14 days requested by BP was alternative relief requested to perform merely a cursory “privilege” search-term review.

If BP is ordered to produce the 200,000 e-mails, BP must be given an adequate amount of time in which to conduct a privilege review of those documents. In Missouri, “if relevance either has been established or is uncontested and a party claims that a privilege precludes disclosure, the party asserting the privilege usually has the burden of proof to show that the privilege applies.” See Ford Motor Co. v. Westbrooke, 151

S.W.3d at 367. In order to prove the privilege applies, the party asserting it must establish that the privilege should apply through competent evidence. Id. In order for BP to assert either privilege, it must be given an adequate opportunity to review its documents so that it can meet its burden of proof.

The trial court's February 25, 2005 Order, however, stated that BP must produce the 200,000 e-mails by "simply copy[ing] all of the e-mails in their original format onto CD ROM discs." (Exhibit 39 at A1219-1221.) If BP simply puts the e-mails on a CD as ordered by the court, however, it is self evident that it is impossible for BP to perform a full privilege review of the e-mails in only 15 days as ordered by the court, because there are approximately 200,000 e-mails at issue.

BP repeatedly informed the trial court, in briefs and affidavits and at numerous hearings, that to perform any type of privilege review of its e-mails, the e-mails must be migrated into the computer software review program of EED, its third-party vendor. This program allows BP to conduct sophisticated searches designed to cull all potentially privileged e-mails from the group of e-mails that are not privileged. (Exhibit 19 at A529; Exhibit 28 at A759 and A707.) BP cannot perform these searches for privileged documents and electronically separate privileged documents from non-privileged documents if the e-mails are not migrated into EED's program and processed.

The trial court's Order, however, states that BP should "simply copy all of the e-mails in their original format onto CD ROM discs." (Exhibit 39 at A1220.) The court then stated that, because this was not expensive, BP's motion for costs was denied and BP should pay for any privilege review it performs. (Id. at A1220-1221.) While this

language might seem to suggest that the trial court is still giving BP the option of performing a privilege review, under the circumstances of this case, of which the trial court was well aware, this language means nothing. If BP produces the e-mails by simply putting the e-mails onto CDs in their original formats, BP cannot perform a privilege review. By forcing BP to proceed in this manner, the trial court essentially denied BP the chance to conduct a privilege review of the e-mails.

III. RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE OCTOBER 12, 2004, AND FEBRUARY 25, 2005, ORDERS REQUIRING BP TO PRODUCE APPROXIMATELY 200,000 E-MAILS BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION IN THAT THE ORDERS REQUIRE PRODUCTION OF E-MAILS THAT ARE OVERLY BURDENSOME AND EXPENSIVE FOR BP TO PRODUCE IN RELATION TO THE E-MAILS' PROBATIVE VALUE TO PLAINTIFFS.

A. Standard of Review.

If this Court, despite the above arguments, determines that the 200,000 e-mails are potentially relevant and not privileged, the trial court's decision regarding the production of the e-mails would need to be reviewed for an abuse of discretion. Clemens v. Witthaus, 228 S.W.2d 4 (Mo. 1950) (stating that a trial court's discretion "is involved where an inquiry which is within the scope of discovery runs against an interest in privacy or against an assertion that the proposed discovery is burdensome"); see also State ex rel. Ford v. Messina, 77 S.W.3d 602, 607 (Mo. 2002). A trial court abuses its discretion where its ruling "is clearly against the logic of the circumstances, arbitrary and unreasonable, and indicates a lack of careful consideration." Id.

B. BP should not have to produce the 200,000 e-mails because production would be unduly expensive and burdensome.

Even where documents are relevant and not privileged, a court has the power to determine that the documents should not be produced for a variety of reasons. See Mo.

Sup. Ct. R. 56.01(c)(1) and (c)(2) (stating that courts have the authority to “make any order which justice requires to protect a party from...undue burden or expense, including ...that the discovery not be had [or that] discovery may be had only on specified terms and conditions.”). Thus a court may order that certain discovery should not be allowed in any situation in which production of the discovery would place a large burden or expense on the producing party in relation to the benefit received by the other party. Ford v. Messina, 71 S.W.3d at 606 (holding that a court must balance the burden or expense to one party against the other party’s need for the information).

Where a party objects to production of documents due to undue burden and expense, a judge must “balance the need of the interrogator to obtain the information against the respondent’s burden in furnishing it.” Kawasaki, 777 S.W.2d at 252; Ford v. Messina, 71 S.W.3d at 607 (stating the court must determine whether “annoyance, oppression, and undue burden and expense outweigh the need for discovery”). If a trial court orders discovery despite “the immensity of the task of retrieval” and despite the fact that “the material sought to be discovered was of doubtful usefulness to the plaintiffs,” the court will have abused its discretion. State ex rel. Stolf v. Ely, 875 S.W.2d 579, 582 (Mo. Ct. App. 1994) (stating that the granting of a writ was appropriate in Kawasaki, 777 S.W.2d 247, because the “immensity of the task of retrieval” and the immateriality of the material sought were “immediately apparent”). In this case, the trial court abused its discretion when it ignored the expense its Order would impose on BP and the unduly burdensome nature of its Order, especially when balanced against the Plaintiffs’ failure to prove any need for the information.

1. Plaintiffs have not shown any need for the information contained in the 200,000 e-mails.

In order to balance Plaintiffs' interests in production of the information against the burden to BP of production, this Court must first determine whether Plaintiffs need the 200,000 e-mails to pursue their claims. Kawasaki, 777 S.W.2d at 252. This point is dispositive. If they do not need the information, based on BP's showing that it would have to spend \$62,000 to produce it, the balancing test this Court must employ requires that the information not be produced.

Plaintiffs cannot show that they need the information contained in the 200,000 e-mails. As described above, the e-mails in question are not even relevant to this case. Plaintiffs' claims are based on allegations that BP implemented a pricing strategy of charging dealers more for gasoline so that BP could eliminate the dealer channel of trade. (Exhibit 54 at A1595-1599, ¶¶ 40-52.) Discovery of the 200,000 e-mails that did not contain a search term (which included words as general as "strategy" and "pricing") are unlikely to lead to any more information relevant to Plaintiffs' claims.

The procedures BP used for locating relevant documents that are stored electronically fully complies with the procedures set forth in the developing case law on electronic discovery. In addition, those procedures were the same procedures that BP used in two other similar cases with Plaintiffs' counsel in which Plaintiffs never complained that they did not have enough information to pursue their claims, except that the search term list was much more comprehensive in this case. None of the 200,000 e-mails that the trial court ordered BP to produce contained any of these search terms,

except the 5,800 which were deemed irrelevant based on their subject lines. The probability, therefore, that any of the 200,000 e-mails contain relevant information that the Plaintiffs might need to pursue their claims is very low.

In addition, BP has already produced the documents that are necessary for Plaintiffs to pursue their claims. BP began producing the pricing data that is the core of Plaintiffs' claims in 2002. By the time BP filed its Motion for Reconsideration in 2004, BP had already produced millions of pages of electronic and paper documents, including pricing information, dealer files, profit and loss statements and more than 300,000 e-mails. (Exhibit 28 at A726-732; A861-870.) Since that date, BP has made hundreds of thousands of pages of additional information, in both CD and paper format, available to Plaintiffs, including approximately a quarter of a million older e-mails that were inadvertently omitted from the original production. (Exhibit 29 at A1094.) Plaintiffs have thus received an approximate total of more than half a million e-mails and attachments that hit on a search term and do not contain privileged information regarding this case (although it is a certainty that the e-mails contain other privileged information) and millions of pages of other relevant paper or electronic documents.

Plaintiffs received the core pricing information they needed approximately three years ago and have continued to receive relevant information, including information regarding BP's general retail strategy and the specific market strategy for St. Louis, as BP updates its production. Plaintiffs are already in possession of the information they need to pursue their claims. "The discovery procedure has not been formulated for the benefit of a litigant who is already in possession of all the facts." State ex rel. Anheuser v.

Nolan, 692 S.W.2d 325, 327 (Mo. Ct. App. 1985). Plaintiffs have provided no evidence that the additional 200,000 e-mails will yield any other relevant information that has not already been provided that they need to pursue their claims against BP.

Another consideration this Court should weigh in its determination of whether Plaintiffs need the 200,000 e-mails is whether Plaintiffs could receive this information through any other means. Ford v. Messina, 71 S.W.3d at 607-608 (stating that plaintiff could not take top level employees' depositions where they had "not sought the information through less intrusive means."); State ex rel. Blue Cross & Blue Shield v. Anderson, 897 S.W.2d 167, 169 (Mo. Ct. App. 1995) ("the trial court should consider whether the information can be adequately furnished in a manner less intrusive, less burdensome, less expensive than that designated by the requesting party"). Plaintiffs have not conducted a single substantive deposition in this case. If they really feel that they are missing some information after they have reviewed the millions of pages of e-mails that they have already received, a deposition would be a less expensive, less burdensome and probably more productive method of discovering the information, rather than requiring BP to produce the 200,000 e-mails.

2. Discovery of the 200,000 e-mails would be unduly burdensome.

BP has provided the trial court with evidence that it would be unduly burdensome and expensive for BP to conduct a full review of the 200,000 e-mails. The cost to BP to provide the e-mails to Plaintiffs must "be pertinent if the court is to remain faithful to its responsibility to prevent 'undue burden or expense'.... If the likelihood of finding something was the only criterion, there is a risk that someone will have to spend hundreds

of thousands of dollars to produce a single e-mail. This is an awfully expensive needle to justify searching a haystack.” McPeck v. Ashcroft, 202 F.R.D. at 34.

BP’s third-party vendor that is helping BP manage its e-mail review provided the court with an affidavit stating that it would cost approximately \$62,000 to put all of the e-mails into the review program so that BP could view each e-mail and sort the e-mails into categories based on whether they were relevant, privileged or otherwise confidential or private. (Exhibit 28 at A763, ¶ 24.) Thus, to conform to Plaintiffs’ argument that BP must look at every document in order to meet its discovery obligations rather than simply use search terms, BP would have to spend \$62,000. This cost does not include attorney review time, which would be in the hundreds of thousands of dollars for a full review of the 200,000 e-mails.

The trial court, however, reasoned that it was not unduly burdensome for BP to simply put the e-mails on a CD and forgo a review altogether. The trial court intimated that it did not consider it unduly burdensome for BP to spend \$62,000 to put the e-mails into a reviewable format and spend additional thousands for attorney review time, although it did not clearly say it, by stating that “any costs associated with a privilege review of these documents are properly borne by Defendants.” As discussed above, however, the trial court knew that BP could not perform a full privilege review in the 15 days the court allowed it. Thus, the lower court, in effect, expected BP not to perform a review and simply to produce the e-mails, sight unseen, believing that the “protection” it purported to give BP at trial was sufficient to protect BP’s privileged documents, and that if BP chose to conduct a privilege review, it would have to pay \$62,000 to do so. The

trial court abused its discretion by forcing BP to either choose to spend \$62,000 to review all of the documents or forego a review altogether. Because the trial court clearly assumed BP would choose to forego a review, it ignored the evidence BP provided suggesting that it was unduly burdensome to require BP to pay \$62,000 to produce the 200,000 e-mails.

The \$62,000 BP would have to spend to review every e-mail is just a small portion of the discovery costs already incurred in this case. BP has already spent more than a quarter of a million dollars on e-mail production alone, not including attorney review time. Plaintiffs have not stated what they believe their damages to be, but forcing BP to spend an additional \$62,000 in addition to what it has already spent in producing millions of pages of paper and electronic documents, with no showing of responsiveness, is beyond the spirit and intent of the discovery rules. In fact, numerous courts have stated that amounts far less than \$62,000 were burdensome. See, e.g., Byers, 2002 U.S. Dist. LEXIS 9861, at *35 (issuing a protective order shifting part of the cost of a review to the requesting party because a \$20,000 to \$30,000 estimated cost of production was burdensome) (also citing Anti-Monopoly, Inc. v. Hasbro, No. 94 Civ. 2120 (LMM) (AJP), 1996 WL 22976; 1996 U.S. Dist. LEXIS 563; (S.D.N.Y. Jan. 23, 1996), as holding that expenses between \$1,680 and \$6,000 were burdensome). BP has already produced, at a substantial cost, millions of pages of electronic and paper documents that are the core of Plaintiffs' claims. It should not have to incur additional costs in reviewing and preparing documents for production that have very little likelihood of containing relevant information.

In addition to the costs of actually producing the documents, this Court must consider the ancillary costs that BP would have to incur and weigh those against the total cost of production. A federal court in Illinois, using an analysis similar to that done under Missouri Rule of Civil Procedure 56.01(c) (1), held that:

It does appear to the court that the requested documents could be retrieved from the back-up tapes without undue expense. Nevertheless, the technical matter of retrieving the documents from the backup tapes would be just the start of the process. Defense counsel would then have to read each e-mail, assess whether the e-mail was responsive, and then determine whether the e-mail contained privileged information. Given that the volume of e-mail at issue here is potentially very large, the court finds that the burden of reviewing the requested documents would be heavy. The court further notes that expert discovery is beginning. Forcing defense counsel to engage in document review would necessarily distract their energies from the other parts of this ongoing litigation.

See In re Gen. Instr. Corp. Sec. Litig., No. 96C1129, 1999 U.S. Dist. 18182 (N.D. Ill. Nov. 18, 1999); see also Hagemeyer, 222 F.R.D. at 600 (stating that court “must decide whether the burden and expense” of electronic production and “paying an attorney to

review the contents of the tape for privilege outweigh the benefit of relevant information”).

BP’s ancillary cost spent to review the documents would be much higher than the \$62,000 necessary just to prepare the e-mails for review and produce them. BP would incur hundreds of thousands of dollars in fees for attorney review time to review the e-mails, because the 200,000 e-mails could be equivalent to as many as 4,000,000 pages of documents. (Exhibit 19 at A524, ¶ 2; A540) (the 501,000 e-mails gathered by BP contained 20 gigabytes of information); see also Manual for Complex Litigation (Fourth) § 11.446 (2004) (“one gigabyte is the equivalent of 500,000 type-written pages”).

The balancing test this Court implements to determine if certain documents are too expensive and burdensome to produce allows courts to keep parties from purposely propounding useless discovery requests in an attempt to drive up the costs of litigation, hoping to induce settlement. This check on unlimited discovery is especially necessary in the context of electronic discovery, which can be exorbitantly expensive. See ABA Digital Evidence Project Survey on Electronic Discovery Trends and Proposed Amendments to the Federal Rules of Civil Procedure, Preliminary Report, February 2005, available at <http://meetings.abanet.org/webupload/commupload/ST230002/newsletterpubs/DigitalEvidencePrelimSurvey.pdf> at Table 48, p. 33 (reporting that just over 10% of study participants had settled a case in order to avoid electronic discovery costs); see also McPeck, 202 F.R.D. at 34 (noting that the cost of electronic discovery “gives the plaintiff a gigantic club with which to beat his opponent into settlement. No corporate president in her right mind would fail to settle a lawsuit for \$100,000 if the

restoration of backup tapes would cost \$300,000. While that scenario might warm the cockles of certain lawyers' hearts, no one would accuse it of being just").

In Missouri, the courts may prevent such abuse in situations where litigants "are not merely indulging in a fishing expedition, they are guilty of unadulterated harassment and attempted intimidation." State ex rel. Anheuser v. Nolan, 692 S.W.2d at 327-28. The Anheuser court also noted that "subversion of pre-trial discovery into a 'war of paper,' whether to force an adversary to capitulate under economic pressure or to inflate billable hours, is approaching the point of being a national disgrace to the honor of the legal profession. It is the affirmative duty and obligation of trial judges to prevent such subversion." Id. at 328.

This Court should consider that, although BP is a large company, because of its size, BP is a defendant in numerous lawsuits involving a variety of claims. If BP were required to spend hundreds of thousands of dollars on potentially non-responsive e-mail production in every lawsuit, or even just one third of the lawsuits, the cost and burden of litigation could impede company operations. Thus, the ramifications of ordering BP to incur hundreds of thousands of dollars in costs and attorneys' fees could extend beyond this lawsuit to create a precedent that would render litigation prohibitively expensive and burdensome.

IV. ALTERNATIVELY, RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE OCTOBER 12, 2004, AND FEBRUARY 25, 2005, ORDERS IN THEIR ENTIRETY BECAUSE THE TRIAL COURT ERRED AS A MATTER OF LAW BY ORDERING THE PRODUCTION OF 200,000 E-MAILS WITH NO LIMITATION ON THE PRODUCTION OF CLEARLY IRRELEVANT, PRIVATE, PERSONAL AND CONFIDENTIAL E-MAILS UNDER RULES 56.01(b) AND 56.01(c).

A. Standard of Review.

As previously discussed, the standard of review is de novo for the fact that the trial court denied BP the chance to review its documents at all for privilege. Likewise, the Court's treatment of private information contained in the e-mails must also be reviewed de novo because the Court ordered their production without placing any limitations to prevent the production of private e-mails that have no relation to the claims asserted in this litigation. See Mo. Sup. Ct. R. 56.01(b)(1) (allowing production only of documents relevant to the subject matter involved in the pending action); Clemens v. Witthaus, 228 S.W.2d at 10 (holding that the trial court had no jurisdiction, as opposed to abuse of discretion, to order production of certain documents without any limitations, and that to do so constituted an invasion of privacy); see also State ex rel. Madlock v. O'Malley, 8 S.W.3d 890, 891 (Mo. 1999) (holding that "the discovery process was not designed to be a scorched earth battlefield upon which the rights of the litigants and the efficiency of the justice system should be sacrificed to mindless overzealous representation of plaintiffs

and defendants” and therefore, “discovery is limited to information that relates to matters put at issue in the pleadings, especially in relation to sensitive personal information”); State ex rel. Wright v. Campbell, 938 S.W.2d 640, 643 (Mo. Ct. App. 1997) (noting that a party seeking private, confidential information must first show that the information is relevant); Stasser v. Yalamanchi, 669 So. 2d 1142, 1145 (Fla. Dist. Ct. App. 1996) (holding that a court cannot order unlimited access to computers, rather the “order must define parameters of time and scope, and must place sufficient access restrictions to prevent compromising patient confidentiality”). Thus, the court erred as a matter of law by effectively denying BP the chance to review its documents and requiring unlimited production of a group of e-mails that contains private and confidential information.

B. This Court must provide BP with the opportunity to review its documents to protect BP and its employees from disclosure of their private and confidential e-mails.

The need for judicial diligence regarding the production of private information has never been greater than it is now because “the informational facts of life are that institutions in this country now capture more data about more aspects of personal and organizational life regarding more people and entities than anyone thought possible only a few years ago.” Arthur Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427, 466-67 (1991). As the United States Supreme Court has noted, pretrial discovery has significant potential for abuse that results in the production of private information:

This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties.... There is an opportunity...for litigants to obtain - incidentally or purposefully - information that not only is irrelevant but if publicly released could be damaging to reputation and privacy.

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34-36 (1984) (citations omitted). Thus, courts often limit the production of private and confidential information. See MacDonald, 149 S.W.3d at 598 (noting that the court must consider “the extent to which the request will be an invasion of privacy” in determining the appropriate scope of discovery); State ex rel. Missouri Ethic Commission v. Nichols, 978 S.W.2d 770, 774 (Mo. Ct. App. 1998) (stating that, “because discovery may seriously implicate the privacy interests of litigants and third parties, a court may enter an order to prevent the disclosure of such information”).

The United States Supreme Court has held that individuals have two types of privacy interests: “the individual interest in avoiding disclosure of personal matters” and “the interest in independence in making certain kinds of important decisions...[such as] matters relating to marriage, procreation, contraception, family relationships and child rearing and education.” Whalen v. Roe, 429 U.S. 589, 599-600, n.26 (1977). These rights are founded in the Fourteenth Amendment’s concept of personal liberty, although other courts have found the right in the Ninth Amendment. Id. at 600, n.23 (citing Roe v. Wade, 410 U.S. 113, 152-53 (1973)).

Although the Missouri Constitution does not expressly recognize a right to privacy, “the basis of the right to privacy is the right to be let alone” and “grows out of a constitutional right.” Barber v. Time Inc., 159 S.W.2d 291, 294 (Mo. 1942). Thus, in addition to the protection given to citizens by the United States Constitution, since at least 1911, Missouri common law has acknowledged an individual’s right to privacy. Munden v. Harris, 134 S.W. 1076, 1078 (Mo. 1911) (“It may be admitted that the right of privacy is an intangible right; but so are numerous others which no one would think of denying to be legal rights which would be protected by the courts. It is spoken of as a new right, when, in fact, it is an old right with a new name.”).

Missouri courts have determined that numerous types of information should be protected from dissemination due to the private nature of information. For example, courts have held that employees have a fundamental right to privacy in their personnel records, State ex rel. Tally v. Grimm, 722 S.W.2d 604, 605 (Mo. 1987); an individual must be protected from overbroad interrogatories that would invade his fundamental right to privacy in his medical records, State ex rel. Brown v. Dickerson, 136 S.W.3d 539, 545 (Mo. Ct. App. 2004); marital history and employment history should be protected where the lawsuit does not directly concern those issues, State ex rel. MacDonald v. Franklin, 149 S.W.3d 595, 598 (Mo. Ct. App. 2004); and a witness’s journal containing “personal feelings regarding her marriage, her family, her religion, and other matters of an extremely personal nature unrelated to the issues” should be protected in order to protect her from “potential embarrassment resulting from the discovery of journal entries that

contained her deeply personal thoughts,” Edwards v. State Bd. of Chiropractic Examiners, 85 S.W.3d 10, 23-24 (Mo. Ct. App. 2002).

If e-mails contain private information, they are included in the types of documents that should be protected due to privacy concerns. See, e.g., In re John Doe Proceeding, 272 Wis. 2d 208, 237-38 (Wis. 2004) (citing the Federal Electronic Communications Privacy Act of 1986 as amended in 2001 as a “strong expression of society’s expectation of privacy in electronic communications”). It is inevitable that the e-mails that the trial court ordered BP to produce will contain private information that Missouri courts protect. For example, there will likely be e-mails from BP employees concerning very private issues such as health benefits, an employee’s health problems or an employee’s family member’s health problems, retirement benefits or other employee issues. These kinds of e-mails have no bearing on the matters of this lawsuit and, therefore, are not relevant under Rule 56.01(b), and furthermore should not be produced due to their private nature.

BP is confident that the 200,000 e-mails contain private e-mails because in the past e-mail production, due to the trial court’s time limitations, BP was forced to turn over sight unseen the e-mails that did hit on a search term. BP has since reviewed those documents and found many of these types of e-mails that should never have been produced. Without divulging the private contents of these e-mails, BP found e-mails concerning employee health issues, employee benefits, and employee evaluations. Plaintiffs should not be privy to this sort of information. This information was only produced because of the trial court’s time restraints, and BP should not have to turn over any additional e-mails that could contain this type of private information.

V. ALTERNATIVELY, RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING THE OCTOBER 12, 2004, AND FEBRUARY 25, 2005, ORDERS IN THEIR ENTIRETY BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION AS A MATTER OF LAW BY ORDERING PRODUCTION OF 200,000 E-MAILS WITHOUT ALLOWING BP SUFFICIENT TIME TO REVIEW ITS E-MAILS FOR RELEVANCY, PRIVILEGE, PRIVACY AND CONFIDENTIALITY CONCERNS AND WITHOUT ORDERING THAT PLAINTIFFS PAY FOR BP'S REVIEW OF THE E-MAILS, INCLUDING ATTORNEY REVIEW TIME.

A. Standard of Review.

An appellate court reviews the discovery decisions that involve a judge's discretion for an abuse of that discretion. A trial court abuses its discretion where its ruling is "clearly against the logic of the circumstances, arbitrary and unreasonable, and indicates a lack of careful consideration. Ford v. Messina, 77 S.W.3d at 607.

B. The trial court abused its discretion by refusing to consider the extreme burden a review of the e-mails would impose upon BP and then failing to shift the costs of the review to Plaintiffs.

First, it is self evident that if the Court orders these e-mails to be produced, the documents must be reviewed in some fashion before production. As discussed above, attorney review of documents and then consultation with clients regarding any issues of privacy, privilege, relevancy, confidentiality and trade secrets must be done in the first

instance or none of the discovery rules make any sense. BP can only conduct a full review, as Plaintiffs have stated it must, if BP pays its third-party vendor \$62,000 and incurs even more costs for attorney review time. If BP must produce the e-mails at such a great expense, Plaintiffs should be required to pay for the production, including attorney review time.

The Court has the ability to fashion many different sorts of orders to grant a party relief from an expensive production. Not only can the court order that discovery “not be had,” as BP has requested above, but a court can also fashion an order stating that discovery “be had only on specified terms and conditions.” Rule 56.01(c) is similar to Federal Rule of Civil Procedure 26(c)(2), which, using the same language as Missouri Supreme Court Rule 56.01(c), is interpreted to allow a court to “order that a party seeking discovery pay a portion of the expenses incurred in obtaining discoverable materials.” American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443, 448 (W.D. Mo. 1976); see also Stortz v. Seier, 835 S.W.2d 540, 541 (Mo. Ct. App. 1992) (“Rule 56.01(c)... is modeled after Federal Rule of Civil Procedure 26(c)). As a result, federal precedent concerning that rule...is a persuasive guide for the construction of Rule 56.01(c).”).

In addition, Missouri Supreme Court Rule 77.02 allows a court to “require a party to furnish adequate security for anticipated costs.” Together, these rules make it clear that this Court has the authority to either order that discovery not be had at all, or to shift the costs BP will incur to produce the e-mails to Plaintiffs if this Court believes the costs are unduly burdensome or expensive. See also State ex rel. Vanderpool Feed & Supply Co., Inc. v. Sloan, 628 S.W.2d 414, 416 (Mo. Ct. App. 1982) (allowing a deposition to

proceed on the condition that the party taking the deposition pay the costs of its adversary to attend); Multitechnology Services, L.P. d/b/a/ Coserv Broadband Services v. Verizon Southwest F/K/A GTE Southwest Inc., No. Civ.A. 4:02-CV-702-Y, 2004 WL 1553480 at *2; 2004 U.S. Dist. LEXIS 12957 at *5-6 (N.D. Texas July 12, 2004) (splitting costs of production of electronic information evenly between plaintiff and defendant and classifying those costs “as courts costs that could be recovered by the prevailing party upon conclusion” of the lawsuit).

Cost-shifting is therefore simply another remedy that this Court has the authority to grant if it determines that the “annoyance, oppression, and undue burden and expense outweigh the need for the discovery” in the present case. Ford v. Messina, 71 S.W. 3d at 607. The analysis is the same as it was above when BP argued that the e-mail should not be produced at all because the expense and burden to BP was substantial when weighed against the benefit Plaintiffs would receive from production of the documents. If this Court determines that Plaintiffs’ need does not outweigh BP’s burden, this Court can order that the production only go forward on the condition that Plaintiffs pay for it. See, e.g., Vanderpool Feed & Supply Co., 628 S.W.2d at 416.

BP has already demonstrated that Plaintiffs have no need for the information. In addition, BP has shown it can review and produce the information only at great expense - \$62,000 plus attorneys’ fees for a review for privilege, relevance, confidentiality and privacy, which BP has also already shown can be included in the Court’s determination of whether costs should be shifted. See Dodge, Warren & Peters Ins. Services, Inc. v. Riley, 105 Cal. App. 4th 1414, 1421 (Cal. Ct. App. 2003) (cost of relevance and privilege

review to be charged to requesting party); The Sedona Principles, Principle 2, comment (b) and Principle 13, comment (a), (Exhibit 42 at A1375; A1405-06) (stating that “in light of the broad considerations mandated in Rules 26(b)(2) and 26(c) and the potentially enormous costs of privilege review of voluminous electronic materials, it may be appropriate to shift some of the privilege review costs to the requesting party in certain circumstances”); Chimie v. PPG Indus. Inc., 218 F.R.D. 416, 421-22 (D. Del. 2003) (holding that it might be appropriate to shift costs of privilege review because the producing party had to produce documents for a 20-year time period).

An additional policy behind shifting the costs of a review is that forcing the producing party to pay the cost of its own production in every circumstance creates a disincentive for lawyers to narrowly tailor their requests. McPeck v. Ashcroft, 202 F.R.D. at 33-34 (stating, “American lawyers engaged in discovery have never been accused of asking for too little. To the contrary, like the Rolling Stones, they hope that if they ask for what they want, they will get what they need. They hardly need any more encouragement to demand as much as they can from their opponent.”).

This is precisely the position that BP has been placed in by Plaintiffs. The burden associated with producing these e-mails was created by Plaintiffs themselves because they drafted overly-broad discovery requests. (Exhibit 2 at A12; Exhibit 3 at A57.) Plaintiffs have not suggested how their requests could be narrowed to focus on certain limited e-mails so as to limit the number and cost of their production. For example, the requests seek information for a 10- to 15-year time period and request information regarding BP gasoline stations in the entire state of Missouri. (Exhibit 2 at A41 at

Request No. 64) (requesting all documents related to payment of rent to Amoco within Missouri from January 1, 1990). One request even goes so far as to request financial information for BP as a whole, including its worldwide operations. (Exhibit 2 at A43 at Request No. 73.) Where the requesting party “has nearly unfettered ability to control costs by limiting the scope of his discovery requests,” the court should consider shifting the costs to the requesting party. Medtronic Sofamore Danek, Inc. v. Michelson, 2003 U.S. Dist. LEXIS 8587, at *29.

This factor – the ability to control the costs of the production by narrowing discovery requests – is a combination of many factors considered by federal courts that have considered the issue of whether the cost of an electronic production should be shifted to the requesting party. The most cited cases of this genre are Zubulake I and the subsequent decisions in that case dealing with electronic discovery. 217 F.R.D. 309 (S.D.N.Y. 2003). Zubulake I created a test of seven factors, in order of importance, that should be used to determine whether costs should be shifted: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the

relative benefits to the parties of obtaining the information. Id. at 322.¹⁵ Numerous other courts have considered the issue of cost-shifting using a similar test. See, e.g., Rowe

¹⁵ Zubulake I stated that cost-shifting should only be considered if data is “inaccessible.” 217 F.R.D. at 49-50. Plaintiffs argue that BP’s data is accessible because it was on CD-ROMs. (Exhibit 59 at A1685-86.) In Zubulake III, however, Judge Scheindlin did not say that costs should never be shifted for accessible data, only that “typically” they would not be shifted if the data was accessible. 216 F.R.D. at 284. In an interview, available at www.thesedonaconference.org, Judge Scheindlin was asked “How do you respond to the observation that such an approach takes a large volume of responsive material, the technologically accessible data, outside the proportionality test of Rule 26?”. She stated, “I have often heard that criticism, but I must say it is neither what I intended nor what I wrote....Ordinarily, and again I express ‘ordinarily,’ in the e-discovery context, if data is accessible, there is no undue burden and, therefore, no need to reach the cost-shifting question. This does not take accessible data outside the proportionality test....” In fact, the Proposed Federal Rules note that adding a rule regarding how parties should treat inaccessible data does not affect the applicability of the proportionality test to accessible data. See Report of the Advisory Committee (Exhibit 60 at A1748). One court, noting that the Zubulake cases do not limit the types of orders a court can issue under Rule 26, shifted half the cost of producing accessible data to the requesting party. Multitechnology Service, 2004 WL 1553480 at *1-2; 2004 U.S. Dist. LEXIS 12957 at *4-6.

Entertainment Inc., v. The William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002); Murphy Oil USA Inc. v. Fluor Daniel, 2002 U.S. Dist. LEXIS 3196; Wiginton v. CB Richard Ellis, Inc., 2004 U.S. Dist. LEXIS 15722 at *13. The above factors are based on the balancing test required by Federal Rule 26(b)(2), which is the test courts should employ to determine if relief is appropriate if a party requests protection under Rule 26(c). See Fed. R. Civ. P. 26(b)(2) and 26(c).

BP, in analyzing its argument under Missouri Rule of Civil Procedure 56.01(c), has addressed the Zubulake factors in its discussion of the burden and expense that producing the e-mails will impose upon BP. It is not necessary, nor advisable, however, for this Court to adopt a rigid test comprised of these factors (or similar factors), as the federal courts have done. This is because the determination as to whether a protective order should issue is a determination that must be done on a case-by-case basis, and creating a list of factors to apply to every case may not allow for a decision based on the circumstances of a particular case before this Court.

Rather, the general test that this Court has used for years, balancing one party's need for the information against the burden and expense imposed on the other party to produce it, is an inquiry that can be applied in each and every case that appears before a

court in Missouri.¹⁶ See, e.g., Ford v. Messina, 71 S.W.3d at 607. Other states that have addressed the issue of electronic discovery have taken this approach. See, e.g., Lipco Electrical Corp. v. ASG Consulting Corp., No. 8775101, 2004 WL 1949062 at *8 -*9 (N.Y. Sup. Ct. Aug. 18, 2004) (recognizing that the federal courts are developing “procedures and analyses for determining who should bear the cost of electronic discovery,” but nonetheless applying New York discovery law rather than entertaining the factors set forth in the federal cases); Ex parte WAL-MART, Inc., 809 So.2d 818, 821-23 (Ala. 2001) (using Alabama discovery laws to determine if production of electronic information from a database was unduly burdensome); Dodge, Warren & Peters Ins. Services, Inc. v. Riley, 105 Cal. App. 4th 1414, 1421 (Cal. Ct. App. 2003) (stating that, under California law, a party would not suffer irreparable harm if an injunction that required certain electronic documents not to be destroyed was upheld

¹⁶ Although this Court can resolve this issue based on its own existing discovery rules, BP refers this Court to the federal case law regarding cost shifting and BP’s discussion of that case law in previous briefs for additional authority should this Court determine it is necessary. (Exhibit 48 at A1501 - A1515); see also ABA’s Amendments to Civil Discovery Standards, § VIII, Standard 29(b)(iii) (August 2004) (Exhibit 62 at A1823-1825) (discussing factors courts may consider in allocating costs of electronic discovery, including “the burden and expense of a privilege review by the producing party and the risk of inadvertent disclosure”).

because the costs of reviewing the electronic documents, including privilege review costs, had been shifted to the requesting party).

Similarly, this Court should continue to use the balancing test it currently uses in non-electronic discovery disputes, but give guidance on how the test applies to electronic discovery. Where, as in this case, the need for the information is almost certainly non-existent or, at best, uncertain, and the burden and expense of production is high, the balancing test requires this Court to either deny that the discovery be had at all or, at the very least, requires that the requesting party pay for the production of such information.

THIS COURT’S AUTHORITY TO APPLY THE EXISTING DISCOVERY RULES TO ELECTRONIC DATA.

Although this Court has authority under the Missouri Constitution, Article V, Section 5, to enact rules regarding pleading, practice and procedure, this Court does not have to wait to decide this case until it promulgates new rules of civil procedure regarding electronic discovery. Rather, it can give guidance on this issue as it has done in the past when new technologies created uncertainty as to how the discovery rules would

apply to that technology.¹⁷ As The Sedona Principles note:

The best approach to electronic discovery begins by recognizing how existing precedent and new technology interact. The rules governing discovery are...broadly stated standards that require reasonableness in their application. As such, the rules governing discovery are *media neutral*, in that they apply to documents existing in all media – paper, electronic, or stone tablets. Due to their generality, however, the proper application of the rules only takes shape when one understands the specific context in which the rule is applied.

The Sedona Principles, Introduction at p. 8 (Exhibit 42 at A1369).

Missouri courts have often interpreted rules to apply to new situations, giving the bench and bar guidance on the application of this Court's Rules. For example, in State ex

¹⁷ The Federal Rules of Civil Procedure are being revised to explicitly incorporate electronic discovery. See Report of the Civil Rules Advisory Committee regarding the Proposed Rules of Civil Procedure (Exhibit 60). The issues raised in this brief, however, are substantively unaffected by the proposed rule changes. In fact, the comments to the Proposed Rules note that the limitations that previously applied to a party's request for a protective order continue to apply to both accessible and inaccessible electronic data. (Exhibit 60 at A1748.) In addition, the Proposed Federal Rules still only contemplate production of relevant and non-privileged documents.

rel. Lucas v. Moss, 498 S.W.2d 289 (Mo. banc. 1973), this Court determined how to interpret the rules in light of a new technique of discovery: the video deposition. This decision provides an example of this Court working within the existing Missouri Supreme Court Rules to resolve a procedural issue that arises due to a technological advancement.

In Lucas, the question before the Court was whether depositions could be recorded by videotape where the rules did not expressly provide for it. The respondent argued that the trial court could not allow it because it would require legislation or amendment to the Supreme Court Rules. This Court held that, because this issue was “one of considerable importance to the trial courts, to the legal profession, and to the general public,” the “public interest in the prompt administration of justice demands a determination of the question.” Id. at 290.

To reach its decision, this Court reviewed the current discovery rules, Missouri criminal law (which had used taped confessions as evidence for years) and other states’ laws, and held that the rules did not prohibit video depositions. This Court also stated that it was considering a rule “setting forth the procedures to be employed on audiovisual depositions,” but until that rule became effective, the holdings and guidelines set forth in that opinion should be followed. Id. at 292-93. A rule regarding this issue was promulgated approximately seven months later. See Sup. Ct. R. 57.03.

This Court frequently creates rules through its opinions rather than waiting to promulgate a new rule for publication in the Missouri Supreme Court Rules. See, e.g., State ex rel. Tracy v. Dandurand, 30 S.W.3d 831, 836 (Mo. banc. 2000) (creating a

bright-line rule regarding discoverability of documents provided to experts under Supreme Court Rule 56.01(b)(4)); State ex rel. Atchison, Topeka & Santa Fe Railway Co. v. O'Malley, 898 S.W.2d 550, 554 (Mo. 1995) (creating specific guidelines for claiming a work product privilege even though the Supreme Court Rules do not contain express language regarding the issue); Patton v. May Department Stores Co., 762 S.W.2d 38, 41-42 (Mo. banc. 1988) (allowing telephone depositions because the rules did not specifically prohibit them); Laws v. City of Wellston, 435 S.W.2d 370, 374-75 (Mo. 1968) (reviewing other states' laws and holding that the discovery rules should be interpreted to require a party to update its answers if the after-acquired information is material or where the original answers would be wrong or incomplete if not updated); Burnett v. Griffith, 769 S.W.2d 780, 789 (Mo. banc. 1989) (changing the reading of an MAI based upon its evaluation in its opinion – the MAI was officially changed about one year later); Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 111 (Mo. banc. 1997) (looking to other states' laws and applying a new burden of proof for punitive damages in civil tort cases).

This Court has the authority to interpret the current discovery rules to take into account a new technological advancement. Like the issue of the video deposition in Lucas, the issue before the Court now is one of utmost importance to the Missouri bar and judiciary. Almost all cases involve some sort of electronic discovery. The lower courts and the litigants themselves must be given immediate guidance on how to conduct electronic discovery so that there is no confusion regarding the correct way to discover electronic materials.

In interpreting the discovery rules as they apply to electronic discovery, this Court should take into account Missouri Supreme Court Rule 41.03, which states that “Rules 41 to 101, inclusive, shall be construed to secure the just, speedy and inexpensive determination of every action.” In this case, the trial court’s Orders do not meet these standards. The trial court ordered production of 200,000 irrelevant documents. Even assuming there may be relevant documents contained in them, the court ordered production without giving BP an adequate chance to review those documents for relevance, privilege, confidentiality or privacy concerns. Any review BP could have performed in 15 days would have been extremely costly and would have been inadequate, because BP would not have been able to review all of the millions of pages of documents in only 15 days. The trial court attempted to downplay the significance of its Orders by stating that BP would not waive its right to assert the privilege at trial if any privileged documents were accidentally produced. The Orders do not promote the “just” and “inexpensive determination” of the action before the trial court. Rather, they promote injustice by ignoring the discovery rules regarding relevance, privilege, privacy and confidentiality and they promote undue expense by ordering BP to pay for a review of documents that are not likely to lead to the discovery of admissible evidence.

CONCLUSION

For these reasons, and for those stated in BP’s Petition for Writ of Prohibition or, in the Alternative, Petition for Writ of Mandamus, BP requests that this Court make the preliminary writ absolute, prohibiting the trial court from enforcing its October 12, 2004, and February 25, 2005, Orders. This Court should hold that BP’s search term

methodology was reasonable and complied with Rule 56.01 and that Plaintiffs requested 200,000 additional e-mails that are irrelevant to the subject matter involved in the pending action under Rule 56.01(b)(1) and should not be produced or that such production is unduly burdensome.

Alternatively, if this Court determines that the 200,000 e-mails are potentially responsive, BP requests that this Court allow BP a reasonable amount of time to review any of the “hits” for privilege, privacy, confidential matters and relevancy with the cost of the review, including BP’s attorneys’ review time, to be shifted to Plaintiffs.

BP further prays for such other relief as the Court deems just and proper.

September 2, 2005

Respectfully submitted,

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CERTIFICATE OF VIRUS-FREE COMPUTER DISKETTE
AND CERTIFYING WORD COUNT

The undersigned certifies that a copy of the computer diskette containing the full text of Relator's Brief is attached to the brief and has been scanned for viruses and is virus-free.

The undersigned also certifies that this Brief complies with the limitations contained in Rule 84.06(b), in that, excluding the cover page, Certificate of Service, this Certificate and the signature block, it contains 29,517 words, according to the word count tool of Microsoft Word.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served, via hand delivery, on this 2nd day of September, 2005, to:

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